United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7171

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

SEA-LAND SERVICE, INC., *et al.*,

Plaintiffs-Appellants,

—against—

AETNA INSURANCE COMPANY, *et al.*

Defendants-Appellees.

JOINT APPENDIX

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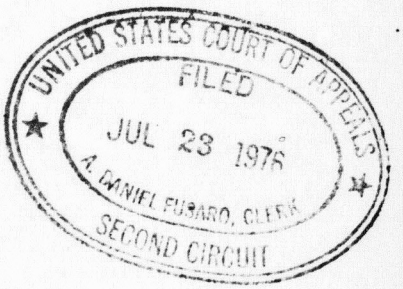
(Pages 1a to 473a)

and EXHIBIT VOLUME
(Pages E-1 to E-115)



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PAGINATION AS IN ORIGINAL COPY

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Docket Entries

DATE	PROCEEDINGS
MAR-21-72	FILED COMPLAINT. ISSUED SUMMONS.
May - 5-72	Filed Dft.s Interrogs.
May - 5-72	Filed Notice to produce pursuant to rule 34 FRCP by dfts.
May - 5-72	Filed ANSWER.
Jun -26-72	Filed ANSWER of defendants to complaint.
Apr -17-73	Filed Order that pltff. respond to dft. interrogs. within 30 days, etc. Ryan J. (M/N)
May -17-73	Filed Dft. Sea Land Service Inc. Answers to Interrogs.
Jul -23-73	Filed Order. that the time for parties to complete all discovery is extended to 9/18/73. Ryan J. (Consented to)
Sep -19-73	Filed Order that the time for the parties to complete all discovery is extended to 12/11/73, Ryan J. Consented to.
Nov. - 2-73	Filed defts' supplemental demand for discovery of documents.
4-16-73	PRE-TRIAL CONFERENCE HELD BY Ryan J.
Jan - 7-74	Filed Pltff. Notice of Examination before trial of defts. on 1/15/75, etc.
May - 7-74	Filed Pltffs. Notice of Motion. Re: Strike Answer & Judgment. ret. 5/16/74.

Docket Entries

DATE	PROCEEDINGS
May - 7-74	Filed Pltffs. Memorandum of Law.
May -24-74	Filed Pltffs Notice of Motion & Affdvt to strike.
May -24-74	Filed Memorandum of Law in support of Pltff's Motion.
May -28-74	Filed Stip & Order that Pltffs. motion now ret. 5/16/74 be adjourned to 5/30/74. Ryan J.
Jun - 4-74	Filed Stip & Order that pltffs. motion for an order to strike defts. answer & render judgment by default to answer interrogs. is adjourned to 6/20/74. Ryan J.
Jun -18-74	Filed Affidavit by David L. Maloof in opposition to pltffs. motion.
Jun -20 74	Filed Stip & Order that pltffs. motion to strike defts. answer be adjourned to 7/25/75. Ryan J.
Jul -11-74	Filed Defts. Answer to Interrogs.
Jul -11-74	Filed Supplementary Interrrogs to be answer by Pltff.
Jul -25-74	Filed Stip & Order that pltffs. motions be adjourned to 8/23/74. Ryan J.
Aug. -22-74	Filed Stip & Order that the time for pltffs. motion is extended to 9/24/74. This application is denied. Ryan J.

Docket Entries

DATE	PROCEEDINGS
Aug. -23-74	Filed memo endorsed on motion filed 5/7/74—Motion withdrawn without prejudice. & referred to Magistrate Jacobs for assignment to a Magistrate for preparation of a pre-trial order and for supervision over discovery. So Ordered—Ryan, J. mailed notices.
9-11-74	PRE-TRIAL CONFERENCE HELD BY GOETTEL
10-21-74	PRE-TRIAL CONFERENCE HELD BY GOETTEL
Nov -13-74	Filed Stip & Order that the actions 72 Civ. 1170 & 72 Civ 1875 be consolidated for all purposes. So Ordered Ryan J.
Jan - 6-75	Filed Pltffs. Notice of Deposition De Bene Esse on 1/20/75.
Jan -10-75	Filed Pltffs. Answer to supplemental Interrogs.
Jan -31-75	Filed Supplementary Demand for Demand for Discovery of Documents.
Feb - 4-75	Filed Magistrate Goettel Report.
Feb - 5-75	Filed Defts. Notice of deposit on De Bene Esse of Virgilio Antonio Rojo Calderon on 2/24/75.
Apr - 8-75	Filed Defts. Further Answers to interrogs. propounded by pltff.

Docket Entries

DATE	PROCEEDINGS
4-15-75	PRE-TRIAL CONFERENCE HELD BY Goettel
4-26-75	PRE-TRIAL CONFERENCE HELD BY Goettel
Apr -29-75	Filed Pltffs. Response to Discovery & Inspection.
4-28-75	PRE-TRIAL CONFERENCE HELD BY Goettel
Jun - 2-75	Filed Consented Pre Trial Order. W Ryan J.
Jul. -15-75	Before Knapp, J. Non-Jury trial begun.
Jul. -16-75	Trial continued.
Jul. -17-75	" " & concluded. Decision Reserved.
07-30-75	Filed stip & order that pltff's underwriters be added to action as named pltff's. The addition of the underwriters changes the caption to read as indicated. Knapp, J.
9-19-75	Filed transcript of record of proceedings dated July 15, 16, 17, 1975.
10-31-75	Filed deft's post trial memorandum of law.
10-31-75	Filed deft's findings of fact proposed by deft's
Dec. -08-75	Filed stip & order that time of parties to file & serve reply briefs is ext. from 12-5-75 to 12-12-75. Knapp, J.

Docket Entries

DATE	PROCEEDINGS
Dec. -12-75	Filed deft's reply post trial merorandum of law.
02-10-76	Filed deft's proposed findings of fact.
02-10-76	Filed Proposed Findings of Fact Submitted on behalf of pltff.
02-10-76	Filed OPINION #43863. Let deft SUBMIT AN ORDER ON 5 Days' notice. Knapp, J.
03-19-76	Filed Consent JUdgment #76,240: Ordered, adjudged that the above mentioned pltff's recover of above mentioned deft's interest on the sum of $54,231.17 at the rate of 6% per annum from 2-1-69 until 2-29-76 in the amount of $23,048.25 & thereafter at the rate of $9.00 per day until entry of this judgment. The parties shall each bear their own costs. Knapp, J. Judgment Ent. Clerk.
03-30-76	Filed pltff's Sea-Land, et al notice of appeal from final judgment entered. on 3-19-76. Mailed copy to Donovan, Donovan, Maloof & Walsh.
03-30-76	Filed Bond undertaking for costs on appeal in the sum of $250.00 by National Surety Corp.
5- 5-76	Filed post trial memo of pltff. (should read Filed record on appeal)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
80 BROAD STREET NEW YORK
ENTERED
BY

SEA-LAND SERVICE, INC.,

Plaintiff,

-against-

AETNA INSURANCE COMPANY, AMERICAN INTERNATIONAL UNDERWRITERS CORP., AMERICAN INTERNATIONAL MARINE AGENCY, AMERICAN MOTORIST'S INSURANCY COMPANY, APPLETON & COX, INC., ATLANTIC MUTUAL INSURANCE COMPANY, BOSTON OLD COLONY INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CRUM & FOSTER INSURANCE COMPANIES, FEDERAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, JEFFERSON INSURANCE COMPANY, MARINE OFFICE OF AMERICA, WILLIAM H. McGEE & COMPANY, NEW ZEALAND INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INSURANCE COMPANY, TRAVELER'S INDEMNITY COMPANY, TALBOT, BIRD & COMPANY, INC., UNION INSURANCE SOCIETY OF CANTON, CONTINENTAL INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, INDEMNITY MARINE ASSURANCE COMPANY, LTD., NATIONAL UNION FIRE INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., and UTICA MUTUAL INSURANCE COMPANY,

Defendants.

COMPLAINT

1. This is an admiralty and maritime cause within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure for the United States District Courts, as amended.

2. Plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, having an office and place of business at

Corbin and Fleet Streets, Elizabeth, New Jersey, and at all times hereinafter mentioned was the owner pro hac vice of the s/s Beauregard.

3. Upon information and belief, defendants are corporations organized and existing under and by virtue of the laws of the State of New York, or one of the other states of the United States of America or Great Britain, having offices and places of business within this District as shown in Schedule A annexed hereto, and were and still are engaged in business as marine insurance underwriters.

4. At all times hereinafter mentioned, the s/s Beauregard was a container ship having the dimensions of 450 feet in length, 72 feet, 1 inch in width, and 40 feet, 2 inches in depth. She was a vessel of 7,865 tons dead-weight capacity, and was operated by plaintiff in trade between United States East Coast ports and Puerto Rican and Dominican Republic ports.

5. On or about April 28, 1967, the s/s Beauregard sailed from New York with cargo in containers. She loaded and discharged at Baltimore, Maryland and Charleston, South Carolina. She arrived at San Juan, Puerto Rico on May 4, 1967 and sailed from San Juan on May 5, 1967, bound for Rio Haina, Dominican Republic. While proceeding into the harbor at Rio Haina with a pilot on board, she stranded on the west breakwater in a position of peril at 1813 hours, May 5, 1967. Her bow was hard aground, and her port side came into contact with a wrecked tanker. She remained stranded from May 5, 1967 until May 8, 1967, during which time continuous efforts were made to refloat her. On May 8, 1967 at 2108 hours, she was refloated and proceeded into Rio Haina where she commenced discharging

and loading.

6. The damage was preliminarily examined at Rio Haina and a seaworthiness certificate was issued permitting the vessel to proceed on her voyage, after which she sailed on May 10, 1967 and arrived in New York on May 14, 1967.

7. Upon arrival at New York, a thorough inspection of the hull was made and the damage was found to be so extensive that all cargo was discharged on May 15, the voyage was abandoned and 77 containers destined for Baltimore and Charleston were forwarded by other transportation. Repairs to the vessel were commenced on May 16, 1967 and completed on July 1, 1967.

8. The bills of lading issued for the cargo carried on board the said s/s Beauregard contained the following clause with respect to general average:

> "20. GENERAL AVERAGE. General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1950 at the Port of New York or last port of discharge, at carrier's option, and as to matters not provided for in these Rules, according to the laws and usages at the Port of New York or any other place at the option of the carrier. Average agreement and bond, together with such additional security as may be required by the carrier (including cash deposit in U. S. funds, if required) shall be furnished before delivery of the goods.
>
> In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned, chartered or operated by the carrier, salvage shall be paid for as fully and in the same manner as if such salving ship or ships belong to strangers."

9. The stranding referred to in the foregoing paragraphs was not attributable to any act or neglect on

the part of plaintiff herein, but was due to one or more of the exceptions from liability in the United States Carriage of Goods by Sea Act, Section 4 (Title 46, U.S. Code, §1304) including perils of the seas, act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.

10. As a consequence of the occurrences referred to in the preceding paragraphs of this complaint, plaintiff made and incurred sacrifices, disbursements and expenses of a general average nature for the common benefit and to relieve the adventure of a common peril, for payment of which the defendants herein have agreed to be and are bound.

11. Plaintiff has selected the Port of New York as the port of adjustment and a general average adjustment has been prepared by Despard & Co., Inc., 161 William Street, New York, N. Y., average adjusters in the Port of New York. The apportionment of general average among the defendants in this suit is shown in Schedule A annexed hereto. The total amount of general average contribution due from these defendants is $464,979.04.

12. Plaintiff has demanded payment of said contribution from defendants, but defendants have refused to pay any sum or sums on account of general average or special charges.

13. Plaintiff has performed all of the conditions of the contract of carriage, and all and singular premises of this complaint are true.

WHEREFORE, plaintiff prays that process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and maritime juris-

diction, may issue against defendants and that said defendants be cited to appear and answer all and singular the matters aforesaid.

2. That plaintiff may have a decree against said defendants for general average contribution in accordance with the amounts due from each of them as shown in Schedule A annexed hereto, together with interest and costs.

3. That plaintiff may have any other and further relief as in law and justice they may be entitled to receive.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff

By _____
A Member of the Firm.
80 Broad Street
New York, N. Y. 10004

SCHEDULE A ANNEXED TO COMPLAINT

LIST OF DEFENDANTS, THEIR ADDRESSES AND THE AMOUNTS OF THEIR GENERAL AVERAGE LIABILITIES

1.	Aetna Insurance Company 95 Wall Street New York, N. Y. 10005	$ 5,075.51
2.	American International Underwriters Corp. 102 Maiden Lane New York, N. Y. 10038	21,147.22
3.	American International Marine Agency 102 Maiden Lane New York, N. Y. 10038	7,798.90
4.	American Motorist's Insurance Company 90 William Street New York, N. Y. 10038	11,442.76
5.	Appleton & Cox, Inc. 80 Maiden Lane New York, N. Y. 10005	4,452.38
6.	Atlantic Mutual Insurance Company 45 Wall Street New York, N. Y. 10005	28,063.90
7.	Boston Old Colony Insurance Company 80 Maiden Lane New York, N. Y. 10005	16,946.38
8.	Commercial Union Insurance Company 200 Park Avenue New York, N. Y. 10017	2,003.91
9.	Continental Casualty Company 76 William Street New York, N. Y. 10005	1,479.65
10.	Crum & Foster Insurance Companies 110 William Street New York, N. Y. 10038	2,088.86
11.	Federal Insurance Company 90 John Street New York, N. Y. 10038	44,152.59
12.	Fireman's Fund Insurance Company 110 William Street New York, N. Y. 10038	20,114.31

Schedule A Annexed to Complaint

13.	Great American Insurance Company 99 John Street New York, N. Y. 10038	$ 29,497.05
14.	Hartford Fire Insurance Company 123 William Street New York, N. Y. 10038	12,316.73
15.	Home Insurance Company 59 Maiden Lane New York, N. Y. 10005	19,212.07
16.	Insurance Company of North America 79 John Street New York, N. Y. 10038	137,394.56
17.	Jefferson Insurance Company 1 Park Avenue New York, N. Y. 10016	1,998.87
18.	Marine Office of America 123 William Street New York, N. Y. 10038	16,703.18
19.	William H. McGee & Company 111 John Street New York, N. Y. 10038	3,805.36
20.	New Zealand Insurance Company 40 Gold Street New York, N. Y. 10038	148.32
21.	Reliance Insurance Company 161 William Street New York, N. Y. 10038	4,381.98
22.	Royal Insurance Company 150 William Street New York, N. Y. 10038	4,974.91
23.	Traveler's Indemnity Company 80 John Street New York, N. Y. 10038	21,337.10
24.	Talbot, Bird & Company, Inc. 156 William Street New York, N. Y. 10038	18,892.92
25.	Union Insurance Society of Canton 59 John Street New York, N. Y. 10038	138.02

26.	Continental Insurance Company 80 Maiden Lane New York, N. Y. 10005	$ 8,041.13
27.	Centennial Insurance Company 80 Pine Street New York, N. Y. 10005	5,088.21
28.	Indemnity Marine Assurance Company, Ltd. 111 John Street New York, N. Y. 10038	4,070.57
29.	National Union Fire Insurance Company 102 Maiden Lane New York, N. Y. 10038	3,052.93
30.	New Hampshire Insurance Company 125 Maiden Lane New York, N. Y. 10038	3,052.92
31.	Standard Marine Insurance Company, Ltd. 59 John Street New York, N. Y. 10038	3,052.92
32.	Utica Mutual Insurance Company 350 Fifth Avenue New York, N. Y. 10003	3,052.92
Total		$464,979.04

Defendants' Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

SEA-LAND SERVICE, INC.,

Plaintiff,

-against-

INDEX NO.
72 Civ. 1170

AETNA INSURANCE COMPANY, AMERICAN INTERNATIONAL UNDERWRITERS CORP., AMERICAN INTERNATIONAL MARINE AGENCY, AMERICAN MOTORIST'S INSURANCE COMPANY, APPLETON & COX, INC., ATLANTIC MUTUAL INSURANCE COMPANY, BOSTON OLD COLONY INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CRUM & FORSTER INSURANCE COMPANIES, FEDERAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, JEFFERSON INSURANCE COMPANY, MARINE OFFICE OF AMERICA, WILLIAM H. McGEE & COMPANY, NEW ZEALAND INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INSURANCE COMPANY, TRAVELER'S INDEMNITY COMPANY, TALBOT, BIRD & COMPANY, INC., UNION INSURANCE SOCIETY OF CANTON, CONTINENTAL INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, INDEMNITY MARINE ASSURANCE COMPANY, LTD., NATIONAL UNION FIRE INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., and UTICA MUTUAL INSURANCE COMPANY,

ANSWER

Defendants.

----------X

Defendants, by and through their attorneys, Donovan, Donovan, Maloof & Walsh, answer the complaint, upon information

and belief, as follows:

1. Admits the allegations contained in paragraph number "1" of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the allegations of the complaint contained in paragraphs numbered "2" and "8".

3. Admits the allegations of the complaint contained in paragraph number "3".

4. Admits that those defendants who insured cargo on the relevant voyage of the SS BEAUREGARD have not paid sums demanded on account of general average, but except as expressly admitted denies the balance of the allegations contained in paragraph number "12" of the complaint.

5. Denies knowledge or information sufficient to form a belief concerning the allegations in paragraphs numbered "4", "6" and "7", and defendants hereby specifically put plaintiff to its proof that the SS BEAUREGARD was a "container" ship.

6. Denies knowledge or information sufficient to form a belief concerning paragraph number "5" of the complaint but specifically denies the facts as set forth in that paragraph of the complaint relating to how the SS BEAUREGARD became damaged.

7. Denies the allegations contained in paragraphs numbered "9", "10" and "13" of the complaint.

8. Admits that plaintiff selected Despard & Co. as the average adjuster but denies the remainder of paragraph number "11" of the complaint and specifically put plaintiff to its burden of

proof as to each and every item of the General Average Statement.

AS AND FOR A FIRST,
COMPLETE, SEPARATE
AND AFFIRMATIVE
DEFENSE, DEFENDANTS

9. Repeat and reallege paragraphs numbered "1" through "7" of this answer as if the same were more fully set forth herein.

10. Plaintiff is guilty of laches in waiting to institute suit against these defendants for almost five (5) years.

AS AND FOR A SECOND,
COMPLETE, SEPARATE
AND AFFIRMATIVE
DEFENSE, DEFENDANTS

11. Repeat and reallege paragraphs number "1" through "9" of this answer as if the same were more fully set forth herein.

12. Defendants allege that the SS BEAUREGARD was sent to sea on the relevant voyage without plaintiff's exercise of due diligence to make her seaworthy and put plaintiff to its burden of proof that it exercised due diligence to provide a seaworthy ship.

AS AND FOR A THIRD,
COMPLETE, SEPARATE
AND AFFIRMATIVE
DEFENSE, DEFENDANTS

13. Repeat and reallege paragraphs numbered "1" through "12" of this answer as if the same were more fully set forth herein.

14. The stranding was caused through the fault of plaintiff or its agents, servants, managers, etc.

AS AND FOR A SPECIAL APPEARANCE AND ANSWER ON BEHALF OF DEFENDANT, AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, IT IS ALLEGED

15. American International Underwriters Corporation acted in this matter merely as an agent and is under no obligations whatsoever to plaintiff.

WHEREFORE, defendants demand that this Court dimiss the complaint with costs and disbursements.

Dated: New York, New York
May 5th, 1972

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants

By: _____
David L. Maloof
161 William Street
New York, New York 10038

TO:

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff
One State Street Plaza
New York, New York 10004

Interrogatories Propounded by Defendants to Plaintiff, dated May 5, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

SEA-LAND SERVICE, INC.,

Plaintiff,

-against-

INDEX NO.
72 Civ. 1170

AETNA INSURANCE COMPANY, AMERICAN INTERNATIONAL UNDERWRITERS CORP., AMERICAN INTERNATIONAL MARINE AGENCY, AMERICAN MOTORIST'S INSURANCE COMPANY, APPLETON & COX, INC., ATLANTIC MUTUAL INSURANCE COMPANY, BOSTON OLD COLONY INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CRUM & FORSTER INSURANCE COMPANIES, FEDERAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, JEFFERSON INSURANCE COMPANY, MARINE OFFICE OF AMERICA, WILLIAM H. McGEE & COMPANY, NEW ZEALAND INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INSURANCE COMPANY, TRAVELER'S INDEMNITY COMPANY, TALBOT, BIRD & COMPANY, INC., UNION INSURANCE SOCIETY OF CANTON, CONTINENTAL INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, INDEMNITY MARINE ASSURANCE COMPANY, LTD., NATIONAL UNION FIRE INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., and UTICA MUTUAL INSURANCE COMPANY,

Defendants.

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INTERROGATORIES PROPOUNDED BY DEFENDANTS TO PLAINTIFF TO BE ANSWERED IN WRITING AND UNDER OATH.

1. When was the SS BEAUREGARD Constructed?

a) Where?

b) What was the name of the builder?

c) What was the name of the shipyard?

2. Give the names of all owners of the SS BEAUREGARD since she was constructed and the dates title passed from one to the other up to the time she came into the ownership of the plaintiff.

3. Was the ship built as a "container" ship?

a) If not, what type of ship was she when when she was constructed?

4. Subsequent to title of the SS BEAUREGARD passing to the plaintiff, or in connection therewith, were major changes made in the structure of the ship?

a) If yes, describe in detail all such changes giving the purpose of all structural changes.

b) What company and what shipyard made the structural changes?

c) Give the dates of all specifications and itemized bills which were paid for these changes.

5. Does the plaintiff know the cause of the stranding?

a) What was the cause?

b) What could have been done to avoid the stranding by action taken before the voyage?

c) What could have been done to avoid the stranding by action taken during the voyage?

6. In detail, what were the weather conditions at the time and place when the SS BEAUREGARD stranded in Rio Haina?

a) What procedures did plaintiff have at this time to ascertain before the voyage weather conditions which might be encountered during the voyage?

7. Did the wind have some bearing on the cause of the stranding?

8. Did the wind give the captain and crew difficulty in maneuvering the SS BEAUREGARD prior to the stranding?

9. What time and on what day did the ship go aground?

a) What part of the ship grounded?

10. Before the stranding and just prior to entering Rio Haina, were there any messages of any kind, oral or written or cabled between the ship and the shipowner and/or operator and/or agents?

a) Describe the messages and advise to whom and from whom they passed.

11. While the ship was stranded, were there any messages of any kind, oral or written or cabled between the ship and the shipowner and/or operator and/or agents?

a) Describe the messages and advise to whom and from whom they passed.

12. What did the plaintiff do in order to extricate the ship from the situation?

13. Describe all communications, including the date, from the shipowner to anyone, except its attorneys-at-law, referring to the stranding and the attempt to rescue the ship.

14. How many attempts were made to extricate the ship?

15. What happened the first time?

a) If the tow line parted, how did this happen?

b) What was the name of the tug which was employed?

c) How many lines were put on the ship?

d) Did the tug do something wrong?

1) What did the tug do wrong?

16. What was the result of the tow line parting?

17. Was the parting of the tow line intentional on the part of the shipowner?

18. How much damage was caused to the hull of the SS BEAUREGARD as a result of going on the strand initially?

a) What person knows that as a fact?

b) What documents support that fact?

19. How much damage was caused to the hull of the SS BEAUREGARD as a result of being taken off the first strand?

a) What person knows that as a fact?

b) What documents support that fact?

20. How much damage was caused to the hull of

the SS BEAUREGARD as a result of going on the second strand?

a) What person knows that as a fact?

b) What documents support that fact?

21. How much damage was caused to the hull of the SS BEAUREGARD as a result of being taken off the second strand?

a) What person knows that as a fact?

b) What documents support that fact?

22. Name all the surveyors who acted on behalf of the plaintiff as a result of this stranding

a) Did they issue survey reports?

b) If yes, give the date of the survey reports and the numbers of the survey reports.

23. Did an officer or officers or managerial personnel of the plaintiff go to Rio Haina during the time the ship was stranded?

a) Name that person or persons and their titles.

24. Did each of the defendants herein sued sign a general average guarantee?

a) Name each defendant, give the date and the bills of lading involved.

25. Were each of the defendants herein sued underwriters of cargo of the SS BEAUREGARD at the time of the stranding?

a) If not, name those that were and give the interest of the others in this law suit.

26. Is the law suit brought here against any defendant based upon any particular average damage rather than general average?

a) If yes, which ones, and describe the particular average damage involved.

27. Has the plaintiff been reimbursed by its underwriters for its losses?

a) If yes, describe which underwriters.

b) Describe the policies under which the payment was made.

28. Who was the broker for the plaintiff under these various policies?

29. Did the plaintiff intentionally strand the SS BEAUREGARD?

30. Did the plaintiff intentionally damage the SS BEAUREGARD in any way to extricate it from this stranding?

a) Give the details of this intentional damage.

Dated: New York, New York
May 5th, 1972.

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants

By: /s/ David L. Maloof
David L. Maloof
161 William Street
New York, New York 10038

TO:
HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff
One State Street Plaza
New York, New York 10004

Answers to Interrogatories, dated May 16, 1973

FILED
5/16/73
ENTERED
BY:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEA-LAND SERVICE, INC.,
Plaintiff,
-against-
AETNA INSURANCE COMPANY, et. al.
Defendants.

ANSWERS TO INTERROGATORIES

72 Civ. 1170

Defendant, Sea-Land Service, Inc., by its attorneys, Haight, Gardner, Poor & Havens, Answers the Interrogatories of the defendants, upon information and belief as follows:

1. 1943

(a) Gulf Shipbuilders
Chickasaw, Alabama.

(b) See (a).

(c) See (a).

2. Plaintiff not owner of said vessel and plaintiff does not know previous owners.

3. No.

(a) C-2S-E1

4. Plaintiff did not have title to said vessel. Ship was a container vessel when chartered by plaintiff and had previously been converted by owner.

(a) Plaintiff's counsel shall permit defendant's counsel an inspection of the specifications with regard to all changes made in the structure of the ship. The purpose of the changes was to convert the vessel from a C-2S-E1 type to a container vessel, C2-X1.

(b) Mobile Ship Repiar, Inc.,

(c) See Answer to Interrogatory 4 (a).

5. Yes.

(a) Contributing causes were poor visibility, unexpected winds and currents, and/or pilot error.

(b) The container vessel Beauregard had entered the same port on numerous prior occasions. Other similar vessels had also entered such port. Pilotage is compulsory. Plaintiff does not know what could have been done to avoid the stranding.

(c) See Answer 5 (b).

6. Wind, Various Directions, Force 5-7. Barometer, 30.04". Temperature 85°.

(a) Plaintiff's marine operations personnel knew what weather could normalll be encountered off the coast of the Dominican Republic. Plaintiff's vessels had frequently called at the same port on previous occasions, as did the Master. Vessel was equipped with radio.

7. Yes.

8. Yes, the wind combined with the current caused some difficulty.

9. 1813 hours, May 5, 1967.

(a) Bow of ship.

10. No.

(a) Not applicable.

11. Yes.

(a) Copies of such messages shall be furnished to defendant's counsel.

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12. Plaintiff was not present. The Master ordered a tugboat to take a line from the starboard quarter of vessel, and, with the tug pulling and the vessel's propellor turning "full astern", the vessel started to come free. However, the tug's line parted.

13. Plaintiff's file of communications will be furnished to defendant's counsel.

14. The s/s Beauregard grounded at 1813 hours on May 5, 1967. Her heading was 357° true. A tugboat took a line from the starboard quarter of the vessel and, with the vessel's propellor turning "full astern", the vessel started to come free. At 1833 hours, the line to the tug parted. The initial attempt to free the vessel was interrupted by this accident, with the result that the vessel's hull moved sideways to port. Severe bottom damage was sustained during bumping and sliding sideway until the vessel came to rest in a position with a heading of 016° true. Thereafter, numerous efforts were made to free the vessel and she was finally re-floated. Attached hereto is Abstract of Deck Log describing such efforts in detail.

15. With the tug "RB-13" towing from the starboard quarter and the vessel's propellor turning at "full astern", the vessel started to come free but the tow line parted.

(a) At 1833 hours on May 5, 1967, the line from the vessel to tug "RB-13" parted. The line parted due to unavoidable slack being placed in the line as the tug surged in the swells.

(b) Tug "RB-13" was used from 1823 hours to 1833 hours on May 5, 1967.

(c) From 1823 hours to 1833 hours on May 5, 1967, one tow line was used between the vessel and tug "RB-13".

(d) No.

16. The result of the tug line parting was that the vessels' hull moved sideways to port. Severe bottom damage was sustained during bumping and sliding sideways until the vessel came to rest in a new position with a heading of 016° true.

17. No, but the Master knew there was a substantial risk that the tow line would part.

18. The particular average attributable to the vessel having stranded on May 5, 1972, at 1813 hours amounted to $47,457.65. The labor and material costs, less scrap credit to repair the hull in regard to this stranding amounted to $32,511.00.

(a) Edward F. Ganly,
Despard and Co., Average Adjusters,
Bethlehem Steel Corporation employees (name unknown).

(b) Reports and notes of Edward F. Ganly.
Reports and notes of Despard and Co., reports and notes of Bethlehem Steel Corp.

19. The damage caused to the hull as a result of the effort to refloat her amounted to $660,855.47. The total general average expenses resulting from the effort to refloat amounted to $763,081.70. The expenses incurred in refloating the vessel, other than the hull damage, amounted to $102,226.23.

19. (a) Edward F. Ganly
Jon Roethke
C. E. Spitz
Despard and Co., Average Adjusters.
Bethlehem Steel Corporation
Various companies and corporations set forth in Statement of General and Particular Average dated January 31, 1969. Other employees and representatives

of plaintiff whose identity and names are presently unknown.

(b) Reports and notes of Edward F. Ganly

Reports and notes of Despard and Co.

Average Adjuster

Reports and notes of Bethlehem Steel Corporation

Various invoices, statements, bills, etc., submitted by various companies as outlined in Statement of General and Particular Average dated January 31, 1969.

20. See Answer to Interrogatory No. 19. The damages mentioned in Answer to Interrogatory No. 19 were caused during the period after the line between the tug and vessel parted and the vessel's hull moved to port, bumping and scraping the bottom. There were not two strandings, in the sense that the bow was always aground during this period.

21. See Answers to Interrogatories No. 19 and No. 20.

22. Edward F. Ganly

F. B. Crocco

Wm. P. Towner

(a) Yes.

(b) Copies of survey reports will be furnished to defendant's counsel.

23. Yes.

(a) Captain J. Mello - Puerto Rico Marine Manager

C. E. Spitz - Claims and Ins. Dept. (New York)

H. Pierce - Port Engineer

24. Yes. Defendants or their representatives signed the Non-Separation of Interest and General Average Agreement. Some of the defendants or representatives signed customary general average guarantees.

(a) Copy of the Non-Separation of Interests and General Average Agreements and the customary general average guarantee in the custody of Despard and Co. If any defendant no longer has copies in its custody and/or control then defendants may examine same at the offices of Despard and Co.

25. Yes.

(a) See Answer to Interrogatory No. 25

26. No.

See Answer to Interrogatory No. 26.

27. Plaintiff has been reimbursed in part, and brings this suit for the benefit of underwriters as well as itself.

(a) Hull underwriters (through Leslie & Godwin, Ltd) Container underwriters (Page 180-G.A. Statement)

Joint Cargo underwriters (Page 181 - G.A. Statement)

(b) Standard Hull Policy; Ocean Cargo and Freight Insurance; Master Vehicle and Container Floater.

28. Despard International Inc.

29. On May 5, 1967, at 1813 hours, the plaintiff did not intentionally strand the s/s Beauregard.

30. and 30 (a). On May 5, 1972, after the bow grounded, the Master of the vessel intentionally engaged the tug, RB-13, and a line was run from the starboard quarter of the s/s Beauregard to said tug. The vessel's propellor was turned "full astern" and the tug pulled on the tow line. At 1833 hours, the tug line parted and the vessel then bumped and scraped along the bottom causing hull damage. The effort made to free the vessel was intentional and the general average damage claimed herein was due to the consequences of the attempt to free the vessel. The Master knew that the line might part and that additional damage might be sustained in the effort to free the vessel. The risk taken

intentional and the bottom damage was the result of taking that risk.

Plaintiff reserves the right to amend answers if new information is received.

Dated: New York, New York

May 16 , 1973.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff
Sea-Land Service, Inc.,
One State Street Plaza
New York, New York 10004

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

LeROY S. CORSA, being duly sworn, deposes and says:

That he is a member of the firm of Haight, Gardner, Poor & Havens, attorneys for plaintiff herein; he has read the foregoing Answers to Interrogatories and knows the contents thereof; and that the same are true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes them to be true.

The reason this verification is made by deponent and not be plaintiff, is that plaintiff, Sea-Land Service, Inc., is a corporation none of whose officers are within this jurisdiction.

The sources of deponent's information and the grounds for his belief as to those matters stated in the Answers to Interrogatories to be alleged on information and belief are documents and records in his files.

LeRoy S. Corsa

Sworn to before me this
16th day of May, 1973.

Notary Public

Notary Public, State of New York
Qualified in New York County
Cert. filed with Clerk of New York County
Term Expires March 30, 1974

ABSTRACT OF DECK LOG OF THE S.S. BEAUREGARD, VOYAGE 319

May 5, 1967.
1600/2000 Approaching Rio Haina. 1700 S.B.E. 1716 Full Throttle. 1724 Arrival, East Breakwater Ø315, 1.7 miles. 1738.5 Turning ship-heavy rain squalls. 1748 Pilot E. Torres ab'd. 1751 Second round turn taken account heavy rain at H'b'r entrance. 1802 Rain moving away from Hbr. entrance/ - Various bells & c/c approaching Hbr. entrance. 1811 let go stbd. anchor - Emergency Full Astern(1½ shots in water, on pawl). Vessel failed to answer hard right wheel account strong ENE'ly wind squall. 1813 Bow aground about 15 feet from and 20 feet inshore of end of West Breakwater. Ship's head 357 T. 1823 Tug "RB 13" fast stbd. quarter attempting to pull vessel free. Pilot in contact with Harbor Master via phone. 1833 Line to tug parted. 1841 Tug refused to take another line, shifts to port quarter. 1842 Tug pushing. 1843 Tug stopped. 1848 Tug pushing. 1908 Tug stopped. 1917 Tug pushing. 1925 Capt. in contact with Harbor Master via radiophone. 1940 Tug ceased pushing - moved to starboard quarter to take line to (East) B'water. Cloudy with shifting winds and heavy squalls early part of watch.

1800	Visibility:	Fair/poor.	Wind:	Various 5-7.	Barometer:	30.04.	Air Temp:	85	80
2000	"	Good	"	ENE 5	"	30.06	" "	84	79

2000/2400 2018 Tug "RB 12" alongside P/Quarter. 2040 Tug "RB 13" got line in wheel Tug's). Tug "RB 12" left vessel to tow tug("RB 13") to port. 2050 Tug "RB13" back on stbd. quarter to take line to breakwater. 2145 Tug cannot land line on breakwater. 2152 Tug "RM 17" Standing By.2208 Tug "RM 17" fast on S/Q, vessel's line. Various phone calls made by Master to Agent ashore to get tug to come alongside. Vessel had by now moved to westward, so that bow was approx. 175 feet inshore of end of West B.W. Vessel's head 015 T. 2225 Tug "RB 12" line (ship's line) on S/Q. 2320 Started discharging ballast #6 D.T. to lighten vessel, after Master had received guarantee that tugs would continue pulling on stern. 2400 Various engine movements as per bell book to try and float vessel.

2200	Visibility:	Good	Wind:	ENE 5	Barometer:	30.05	Air Temp:	74	70
2400	"	Good	"	ENE 5-4	"	30.05	" "	73	70

May 6, 1967.
0000/0400 0000 Aground as before off Rio Haina W. Breakwater. Two tugs fast on S/Q as before assisting vessel. Master & Pilot E. Torres on bridge. 0400 Scattered Clouds. Heavy ESE'ly swell. Vars. speeds as per bell book attempting to free vessel.

0400/0800 Vessel still aground. 0406 Fin. pumping out #6 D.T. Vessel lightered in attempt to free her by engine manouvers unsuccessful. 0532 Tug "RB12" away(S/Q) after heaving go line. 0536 Tug "Haina"("RM 17") S/Q let go line & departed. Both tugs had been requested not to let go lines. 0542 Both lines aboard aft. 0540 Start ballasting #6 D.T. 0633 Stern gun line to East Breakwater. 0702 Line on Breakwater - keeping strain on same to prevent vessel moving further ashore after tugs left. 0724 Stopped ballasting #6 D.T. 0751 Line to breakwater slacked for traffic.

0800/1200 0820 Heave on stern line. 0835 Stop heaving stern line to let Tug "RM 17" Alongside. 0844 Resume heaving stern line. 0852 Tug "RM 17" fast S/Quarter. 0900Slacked on Breakwater let go. Heave in line. 0921 Heave S/Anchor tight. 1100 Capt. Hello, Sea-Land Marine Manager on board. 1114 Raise Crane Jibs, port side forw'd & aft. Various engine movements to free vessel. 1200 Tug RM 17 continue pulling with vessel's line on S/Quarter.

1200/1600 1200 Engr. on watch given correct time. 1344 Dominican Republic Frigate #102 fast on S/Q. 1405 Frigate's towing Hawser(ship's line) parts. 1410 Frigate dismissed. Stbd. anchor hove home. 1500 Tug Haina away due to engine trouble. 1525 Capt. Hello ashore. 1600 Passing rain squalls. Heavy ESE'ly swell. Vars. speeds as per bell book attempting to free vessel.

1600/2000 1605 Finish ballasting #6 D.T. 1720 H. Pierce, Port Engineer, ab'd accompanied by Mr. Ted Tancsof El Morro Marine Survey & Salvage Co. (Scuba inspection of port side 1751 - 1820). 1840 Start ballasting #1 D.T. Mod. SE'ly swells. Vessel aground awaiting arrival of tugs.

2000/2400 Finish ballasting #1 D.T. Watch maintained on bridge. Bilge soundings taken on board indicate SE'ly swell. Vessel awaiting arrival of tugs. All rules and regulations for a vessel aground observed. Decks well lighted. Bearings checked. No change position.

0515, May 6, 1967 Pos. of ship by bearings: Ship's Head 015. Buoy and breakwater ... Pt. in harbor 063. Fort stack 302. Black on beach 269.

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ABSTRACT OF DECK LOG OF THE S. S. BEAUREGARD, VOYAGE 319 (Cont'd)

May 7, 1967.
0000/0400 0000 Aground as before off Rio Haina W. Breakwater. 0400 Scattered clouds. Short, low ESE'ly swell. Bilge soundings taken hourly.

0400/0800 Vessel remains grounded. 0600 Start pump out #1 D.T., per Port Engineer's instructions. 0730 Stopped discharge ballast from #1 D.T., as vessel commenced pounding slightly. Cloudy with low SE - SExE'ly swell.

0800/1200 Capt. Mello, Sea-Land Marine Magr. @ 0830. H. Pierce, Port Engr., and Mr. Ted Tanos of El Morro Marine Survey ab'd @ 0910. Position bearing check - no change. 0730 to 1030 Mr. Ted Tanos made inspection stb'd side below water line. 1200 Vessel awaiting arrival tugs, occasional light pounding.

1200/1600 Mr. G. Furia, Third Asst. Engr., given correct time at 1200. 1355 Pilot E. Torres ab'd. 1425 Master, Capt. Mello, & Pilot on bridge. 1429 Tug Cabo Rojo now dragging vessel's stb'd anchor to position abeam #3 Hatch about 200 ft. out. 1438 Tug's hawser(ship's manila line) parts. 1456 Mr. L. Roberts, 3/O, now on bridge. Mr. C. Proschwitz, 3/O, now standing by on stern with Chief Mate. 1508 Tug Borinquen fast on S/Q. 1525 Tug Cabo Rojo continues dragging out stbd. anchor. 1540 Six shots of stb'd chain out. Tug now going aft. 1540 Commence pumping out ballast #1 D.T. & #4 D.B. 1600 Cloudy. Long, mod. SE'ly swell. Bilge soundings taken hourly. Continue preparing to attempt to move vessel.

1600/2000 1605 Tug Cabo Rojo fast S/Q. 1609 Tug Haina fast S/Bow. 1610 Full astern, all tugs pulling. Various engine & rudder maneuvers per bell book attempting to free ship. 1711 Tug Haina let go fwd. Periodic attempts during watch to free vessel as ballast continues to be discharged. 1754 #1 D.T. empty; start pump out #1 D. Bott. Partly cloudy with low SE'ly swell at close of watch. Hourly soundings taken.

2000/2400 2127 Tug Cabo Rojo stranded towing line. 2150 Resumed pulling on S/Quarter. 2320 #1 D/B empty. Started pumping out #3 D/B. Tugs continue pulling throughout watch. Partly cloudy. Slight SE'ly swell. Occasional light pounding.

May 8, 1967.
0000/0400 0000 Aground as before off Rio Haina W. Breakwater. Tugs Cabo Rojo & Borinquen fast on stbd. quarter. Master & Capt. Mello on bridge. 0243 - 0320 Renewed Cabo Rojo's towing hawser, Proschwitz, 3/O, supervised same. 0400 Cloudy. Vars. speeds as per bell book (Capt. Mello at con) attempting to free vessel. Long moderate SE'ly swell. Bilge soundings hourly.

0400/0800 Master & Capt. Mello on bridge. Various engine & rudder maneuvers attempting to free vessel per bell book. 0512 Replacing chafing gear on Tug Cabo Rojo's line. 0520 Line O.K. 0532 Replacing chafing gear on Tug Borinquen's line. 0600 Borinquen resumes pulling. 0713 Tug Borinquen lets go, proceeds to Haina for engine repairs. Partly cloudy - slight sea & low SE'ly swell at close of watch

0800/1200 0800 Capt. Mello, Sea-Land representative, left vessel. 0935 Capt. Mello & Fred Martin, Vice President Puerto Rico Lighterage Co., on board. 0945 Tug Borinquen back stand by to take Insurance Cable aft. 1013 Tug Cabo Rojo let go line aft. 1020 Both tugs left vessel and entered port to return at 1300 today. 1200 Slight SE'ly swell. Occasional light pounding.

1200/1600 1200 Mr. G. Furia, 3rd Asst. Engr., given correct time. 1230 Master & Capt. Mello on bridge. 1249 Tug Borinquen fast on S/Q. 1302 Tug Cabo Rojo fast on P/Q. 1305 Capt. Mello at con. Commence vars. bells attempting to free vessel. 1321 Proschwitz, 3/O, now assisting Chief Mate aft running (Ship's) Insurance Wire to Dominican Republic Frigate #452. 1600 Partly cloudy. Long Mod. SE'ly swell. Continue taking bilge soundings hourly.

1600/2000 1620 Insurance cable ab'd Frigate #452. 1626 Cabo Rojo, Borinquen, & Frigate #452 pulling. 1628 Insurance wire to Frigate parted. Tugs continue pulling. 1725 Frigate 452 departs - services no longer required. 1756 Start heave anchor. Cabo Rojo & Borinquen pulling on stbd qtr. Various engine manervers per bell book. 1831 Bow swinging to stbd. 1954 Tug "RD 12" fast stbd bow. AP

2000/2400 2040 Cabo Rojo shifts from S/Qtr. to S/Bow. 2100 Cabo Rojo fast S/Bow. 2103 Anchor aweigh; vessel ofloat. 2105 Started ballasting various tanks. 2120 Tug Rb 12 away. 2130 Borinquen away. 2140 Cabo Rojo let go. 2150 c/c 160. 2210 Tug Cabo Rojo alongside; port officials ashore. Vessel proceeding at course per Master to arrive at Harbor entrance at 0530 tomorrow. Slight SE'ly sea and swell. Rolling easily.

ABSTRACT OF DECK LOG OF THE S. S. BEAUREGARD, VOYAGE 249 (Cont'd)

May 9, 1967.
0000/0400 0100 c/c 163 G. 170 PSC 173 WHC. 0211 Full Ahead. c/s for cross traffic. 0219 Slow Ahead as before for daylight Harbor approach. 0230 c/c 343 G. 343 PSC 346 WHC. 0400 Cloudy. Slight NNWly sea, short low NNWly swell.

0400/0800 0400 5 Mi. SexE of Haina Bikwater. Steaming on slow bell awaiting daylight to dock. 0445 Master at con. 0515 Approach Haina - bells per bell book. 0534 Enter Main a Hbr. W. Breakwater G. 0535 Pilot E. Torres ab'd. 0539 Tug RB 12 alongside S/side. 0539.5 Let go S/anchor 1 shot in hause pipe. 0542 First line ashore. 0546 Alongside. 0551 F. W.B. Vessel secure port side to Molasses Dock. 0600 Finish doubling up lines. Cloudy. 0700 Pratique granted. 0710 Quarantine officers ashore.

0800/1200 0800 Ted Tanos with two vessel's A.B.'s started survey bottom of vessel. 0815 Started ballast #1 D/B with sea water. 0845 Started ballast #4 D/B with fresh water. 0900 First load from #5 D/C. 0940 F. B. Crocco, A.B.S. and C. L. Peterson, from Merritt Chapman, and Scott on board. 0950 Stopped working cargo until more ballast; needed to keep vessel steady. 0950 Capt. John W. Hollendoern, London Salvage, on board. 1020 Diver Tanos completed examination under water hull of vessel. 1200 Finish ballasting #1 D/B; shifted to #3 F. D/B.

"0800/1100 Competent divers examined bottom plating except for numerous indents no fractures noted. Sounding from grounding to present show vessel dry and no change. Skeg, rudder, stern frame found satisfactory. Propeller blades while slightly marked are satisfactory. In opinion of undersigned vessel fit to proceed on voyage and retain her class with the Bureau." (signed) "F. B. Crocco, A.B.S."

1200/1700 1400 Resumed dischg. #5 D/C. 1526 Finish #5 D/C and shifted #6 and discharge. 1605 #6 D/C dischg.; open up port side hatch.

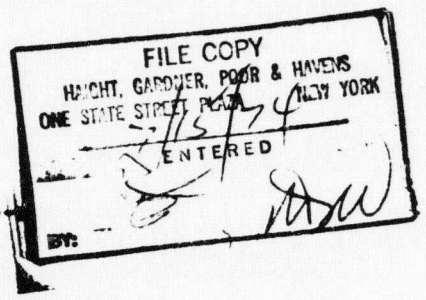
1700/2000 1700 Cover 6 start O/D 1/Tier. 1725 Fin. 1/T 6 start 2/Tier. 1750 Fin. 2/Tier 6 move to 7 2/Tier. 1750 Fin. ballasting #3 A. M. D Bottom. 1810 Fin. 7 2/Tier; all cargo ab'd. 1830 L/S fin. securing & KO. Partly cloudy at close of watch. Gangway, lights, & Lines inspected all in order.

2000/2400 2000 Continue ballasting for stability purposes. Routine inspections throughout vessel - all in good order. Deck and gangway well lighted.

May 10, 1967.
0000/0400 0000 Moored as before. No cargo activity, awaiting scheduled departure. 0325 Commences light rainfall. 0400 Intermittent light rainfall. Calm Hbr. -- Sea.

0400/0800 0400 Taking ballast necessary for stability. 0555 Inspection party searching vessel for contraband. Search completed 0610. 0657 S.B.M. Pilot E. Torres ab'd - single up fore & aft. 0705 Tug RB 12(Hercules) fast S/Qtr. 0711 All clear aft. 0714 Last line gone fwd. 0716 Turning ship. 0727 Let go tug. 0730 Head fair. 0735 Pass through Breakwater. 0736½ Pilot Torres away, Master at con. 0742 Departure Haina.

Answers to Interrogatories, Dated July 15, 1974



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SEA-LAND SERVICE, INC.,

Plaintiff,

- against -

AETNA INSURANCE COMPANY, et al.,

Defendants.

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72 Civ. 1170

(SJR)

ANSWERS TO INTERROGATORIES

1. 1.) Defendants object to these interrogatories on the 2.) 3.) ground that defendants, as cargo underwriters were 4.) 5.) not on the scene when the stranding occurred and they 6.) 7.) put plaintiff to its proof that the stranding happened 8.)

as plaintiff alleges:

Furthermore, paragraphs five and seven of defendants' answers are apparently a mis-reference in plaintiff's interrogatories.

With regard to paragraph 12 of defendants' answer it is obvious that if plaintiff had exercised due diligence to provide a seaworthy ship she would have been seaworthy. Again defendants were not at plaintiff's side when it failed to exercise due diligence.

2. Harold Reineke

a) The seaworthiness of the SS BEAUREGARD at the commencement of the voyage.

b) The improper design of the SS BEAUREGARD during reconversion into a so-called container carrier which rendered her unseaworthy and difficult to control due to the failure to install a new rudder and other parts to compensate for the greater length and the larger sail area and other changes.

c) See B.

3. Defendants were not there but believe that the unseaworthiness of the ship and the lack of due diligence and/or by negligence of the plaintiff and others it employed or others acting for it as well as entering a port area which was unsuitable for a ship like the SS BEAUREGARD, all caused or contributed to the stranding.

a) See 3; also defendants put the plaintiff to its burden of proof.

4. Defendants have no first-hand knowledge that any expenses were justified, necessary, reasonable and/or incurred and put the plaintiff to its full proof that all the alleged general average expenses were in the above categories and that the general average is valid; all as required by the York-Antwerp Rules 1950.

5. Plaintiff failed to exercise due diligence to supply a seaworthy ship; there may be other failures unknown at this time.

6. The SS BEAUREGARD was unsuitable, hard to control, reconverted in a negligent way. She had an unsufficient rudder or was too long and had too much sail area. Rio Haina was an improper port for the SS BEAUREGARD.

7. Plaintiff knows this and defendants put plaintiff to its burden of proving due diligence.

8. See 5 and 6.

9. See 6.

10. Defendants do not know as they were not there.

11. Yes, on information and belief.

12. Yes.

a) Ship was unseaworthy at times when there is any wind in that particular place and the weather is agreed by plaintiff to have been foreseen by it. The Captain testified to the difficulty in maneuvering the vessel.

13. Defendants believe this is so but plaintiff knows best.

14. See 13.

15. Defendants object to this interrogatory on the ground that it is too broad; it covers work product and privileged communications.

16 and 17. Defendants believe so, but reserves the right if any defendants are unintentionally sued herein to move to dismiss as to that particular defendant.

Dated: New York, New York
July 16, 1974.

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants

By:

David L. Maloof
Partner
161 William Street
New York, New York 10038

TO: HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff
One State Street Plaza
New York, New York 10004

GM 497 DLM/DMK

**Stipulation and Order of Consolidation,
Filed on November 13, 1974**

12/4/74
BY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEA-LAND SERVICE, INC.,

Plaintiff,

-against-

AETNA INSURANCE COMPANY, AMERICAN INTERNATIONAL UNDERWRITERS CORP., AMERICAN INTERNATIONAL MARINE AGENCY, AMERICAN MOTORIST'S INSURANCE COMPANY, APPLETON & COX, INC., ATLANTIC MUTUAL INSURANCE COMPANY, BOSTON OLD COLONY INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CRUM & FORSTER INSURANCE COMPANIES, FEDERAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, JEFFERSON INSURANCE COMPANY, MARINE OFFICE OF AMERICA, JEFFERSON INSURANCE COMPANY, MARINE OFFICE OF AMERICA, WILLIAM H. McGEE & COMPANY, NEW ZEALAND INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INSURANCE COMPANY, TRAVELER'S INDEMNITY COMPANY, TALBOT, BIRD & COMPANY, INC., UNION INSURANCE SOCIETY OF CANTON, CONTINENTAL INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, INDEMNITY MARINE ASSURANCE COMPANY, LTD., NATIONAL UNION FIRE INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD. and UTICAS MUTUAL INSURANCE COMPANY,

Defendants.

Index No. 72 Civ 1170 SJR

U.S. DISTRICT COURT
FILED
NOV 13 1974
S.D. OF N.Y.

----------x

SEA-LAND SERVICE, INC.,

Plaintiff,

-against-

NEW HAMPSHIRE INSURANCE COMPANY, THE HANOVER INSURANCE COMPANY, FIREMAN'S INSURANCE COMPANY OF NEW YORK,

Defendants.

72 Civ 1875 SJR

----------x

STIPULATION
AND
ORDER

WHEREAS the within suits involve the same questions of law and fact and it appearing that consolidation thereof for all purposes including trial would be desirable, and it further appearing that this Court would give approval thereto, it is hereby

STIPULATED AND AGREED by and between the undersigned attorneys for all the parties appearing in the within suits, in whatever capacity such parties have appeared, as more specifically set forth in the individual pleadings filed in said suits, that the within entitled actions be consolidated for all purposes.

Dated: New York, New York
November , 1974

/s/ Donald M. Kennedy
DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants

/s/ LeRoy S. Corsa
HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs

SO ORDERED:

New York, New York

November 1' , 1974

U. S. District Judge

Further Answers to Interrogatories Propounded by Plaintiff, Dated April 8, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

SEA-LAND SERVICE, INC.,

Plaintiff,

- against -

AETNA INSURANCE COMPANY, et al.,

Defendants.

----------x

72 Civ. 1170 (SJR)

FURTHER ANSWERS TO INTERROGATORIES PROPOUNDED BY PLAINTIFF

1. 1) Defendants admit that the SS BEAUREGARD stranded on the West breakwater of Rio Haina at or about 1813 hours on May 5, 1967 with her bow aground and her port side in contact with a wrecked tanker and that she was in a position of peril.

2) Defendants admit that the SS BEAUREGARD remained stranded from May 5, 1967 until May 8, 1967 but not that she remained in the same position during that time. Defendants also admit that efforts were made to refloat her. Defendants deny that the efforts to refloat the ship were continuous and in this regard rely upon Captain Boehm, Mr. Mello of Sea-Land Service, Inc., Pilot Torres, and Captain Rojas, along with the ship's logs and other documents supplied by plaintiff.

3) Defendants admit that the ship was refloated at 2108 hours on May 8, 1967.

4) Defendants maintain that the stranding of the ship was directly caused by the intervention of plaintiff's operating manager, Mr. Callie, in the navigation and management of the ship. The stranding was not caused by any exception to liability in the Carriage of Goods by Sea Act. The witness who proves this is Pilot Torres. The stranding was also caused by the unseaworthiness of the ship as described below. The witness is Harry Reineke, Jr., a naval architect, 6001 Dover Place, New Orleans, Louisiana 70114. Documents of plaintiff shall be used in conjunction with Mr. Reineke's testimony.

5) Defendants admit that plaintiff incurred expenses in connection with the removal of the vessel from the strand, however, on the basis of the testimony of plaintiff's employees, Captain Boehm and Captain Mello, and the records produced by plaintiff, as well as the testimony of Pilot Torres and Captain Rojas, the expenses claimed by the plaintiff are not properly recoverable general average expenses. Defendants admit that they have agreed to pay expenses in general average which are properly recoverable.

6) Defendants will use the testimony of Boehm, Mello, Torres, Rojas and Reineke to prove that plaintiff violated its duty to exercise due diligence to provide a seaworthy ship in ways set forth in other answers set forth herein and was negligent in a way which caused this stranding as set forth in other answers set forth herein. Defendants will also employ the documents produced by plaintiff in the preparation of this case.

7) The SS BEAUREGARD on the voyage in question was, in view of its configuration, ill-equipped to enter the port of Rio

Haina and on the basis of the vessel's specifications after conversion, plaintiff knew of this condition. See answers below for specific unseaworthiness of the vessel. The witness is Harry Reineke, Jr. who will use documents produced by plaintiff.

8) Defendants will rely upon the testimony of witnesses Boehm, Torres and Rojas as well as on the testimony of defendants' expert to prove that the stranding was caused through the fault of the plaintiff in that it did not exercise due diligence to provide a seaworthy vessel and that it intervened in the navigation of the ship and supplanted the judgment of Torres and Boehm. Documents produced by plaintiff will also be employed.

2. Since these interrogatories concern plaintiff, defendants cannot answer them.

3. Plaintiff permitted an unseaworthy vessel to attempt entrance to the harbor at Rio Haina.

a) Plaintiff, by its managing shore personnel, intervened in the judgment of the Pilot and the Master and ordered them to bring the SS BEAUREGARD into port at a time when it was dangerous to do so.

Defendants contend that the stranding of the SS BEAUREGARD was not due to one of the exceptions claimed by plaintiff in that plaintiff's managing personnel intervened and directed that the vessel attempt to enter the port at a time when it was dangerous to do so.

4. Defendants are not privy to the expenses claimed by the plaintiff as general or particular average. Furthermore, defendants are not concerned with alleged particular average claims; nor are defendants in a position to determine whether expenses claimed are general average

or particular average since defendants were not parties to the adjustment referred to. It is defendants' position that as to any items claimed to be in the nature of general average expense, they are not properly recoverable either because they are in fact not general average expenses or because general average is not recoverable under the applicable law. Specifically defendants contend that plaintiff is not entitled to recover as general average any damage to the ship which was caused as she completed the strand by going to port, but may recover for actual refloating expenses and damage caused thereby in getting the ship off the strand on May 8, 1967 provided plaintiff is entitled to any general average in the first place, which defendants deny.

7. With respect to the conditions set forth in answer 1 above, defendants contend that these facts were within the knowledge of the plaintiff itself and that it nevertheless allowed this unfit ship to proceed to this unfit port.

8. Defendants allege that plaintiff caused the stranding in that it sent an unseaworthy vessel (as hereinbefore stated) to the port of Rio Haina and that plaintiff intervened in directing that the vessel enter the port at a time when it was dangerous to do so.

9. a) The cause was the unseaworthiness of the vessel, the unfit port and plaintiff's intervention in directing the ship to enter the port.

b) It might have been avoided if the SS BEAUREGARD were seaworthy, especially with respect to the voyage contemplated to the port of Rio Haina.

c) If the plaintiff had not intervened, the stranding may have been avoided by the Pilot.

10. According to the testimony of witnesses who were not connected with the defendants, the weather conditions at the time and place when the SS BEAUREGARD stranded were bad.

12. Yes.

a) Because of insufficient rudder size and engine power for the ship, the wind had an excessive influence on her and made her impossible to control. The slow speed of the ship also contributed to the stranding.

13. According to the testimony, before the stranding there were conversations between the Pilot and plaintiff's managing agents at Santo Domingo, the substance of which was that the vessel should be brought into the port. Messrs. Collin and Manolin had such conversations with Pilot Torres.

14. While defendants believe that during the time the ship was stranded there were conversations between plaintiff and/or its underwriters and/or agents, defendants are not aware of the substance of these communications.

15. Defendants communicated with their attorneys in connection with the incident involving the SS BEAUREGARD. Such communications are privileged.

16. We are advised by plaintiff's agent, the general average adjuster, that this is so.

a) This answer will be sought from the general average adjuster.

17. Yes, either of the cargo or of the containers.

Defendants reserve the right to rely upon other documents and other witnesses in accordance with pre-trial order to be prepared.

Dated: New York, New York
April 8, 1975

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants

BY: /s/ David L. Maloof
Partner

161 William Street
Suite 1900
New York, New York 10038
(212) 964-3553

TO:

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff
One State Street Plaza
New York, New York 10004

FILE COPY
PRATT, CARTER, FOOR & HAYDEN
ONE STATE STREET PLAZA NEW YORK
4/29/75
ENTERED
BY: RE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

SEA-LAND SERVICE, INC., :

Plaintiff, :

- against - :

AETNA INSURANCE COMPANY, et al., :

Defendants. :

- x

PRE-TRIAL ORDER

72 Civ. 1170 ~~(MCR)~~ WK

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 9 of this pre-trial order.

2. The parties agreed that the trial of this action should be based upon this order and upon the pleadings as amended.

STIPULATION OF FACTS

3a. The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

1. At all material times, plaintiff Sea-Land Service, Inc. was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and has an office and place of business at Corbin and Fleet Streets, Elizabeth, New Jersey.

2. Defendants are corporations organized and existing under and by virtue of the laws of the State of New York, or one of the other States of the United States of America or Great Britain, or some other country having offices and places of business within this district as shown in Schedule A annexed hereto and were and still are, engaged in business as Marine Insurance Underwriters.

3. At all times hereinafter mentioned, the S.S. BEAUREGARD was a ship having the dimensions of 468 feet, 8 1/2 inches in length, 72 feet in width, and 40 feet, 1 7/8 inches in depth. She was operated by plaintiff Sea-Land in trade between the United States East Coast ports and Puerto Rican and Dominican Republic ports during the instant voyage.

4. The S.S. BEAUREGARD sailed from New York on April 28, 1967, laden with cargo in containers bound for Puerto Rican and Dominican ports. She arrived at San Juan on the 4th, and discharged and loaded cargo on that and the following day. She sailed from San Juan at 0312 on the 5th, and, while proceeding into Rio Haina with a pilot aboard, she stranded on or near the west breakwater at 1813 hours with cargo destined for Rio Haina and U. S. ports.

5. On May 9, 1967, the vessel proceeded into Rio Haina where she commenced discharging and loading. She proceeded through the breakwater without a pilot and did not pick up a pilot until she was inside the harbor. She departed Rio Haina on the 10th and arrived at New York on the 14th.

6. The voyage was abandoned and 77 cargo containers destined for Baltimore and Charleston were forwarded by other transport.

7. On the 15th, and subsequently, the damage was examined while the vessel lay afloat at Elizabeth and on drydock at the Bethlehem Steel Corporation plant at Hoboken, with representatives of Sea-Land, the classification Society and vessel's underwriters in attendance. Repairs were commenced on the 16th and were completed on July 1, 1967.

8. A General Average was declared by Sea-Land Service, Inc., and the defendants herein through their predecessors or authorized agent, guaranteed payment of all proper General Average.

9. With the exception of expenditures alleged to have been incurred on account of hull damages and examinations related thereto, the amounts for various items of expense were prima facie incurred as are recited in the Statement of General Average, issued by Despard & Co., Inc. on January 31, 1969. Defendants, nevertheless, do not concede that such items of expense as were prima facie incurred were necessarily in the nature of general average expenses.

10. This action is within the Admiralty and Maritime Jurisdiction of United States and of this Honorable Court and is triable by the Court without jury.

11. As the first tug pulled on the ship's starboard quarter, the ship's engines were in use to assist its removal from the strand.

3. Contentions of plaintiff Sea-Land Service, Inc.

1. The stranding was attributable to one or more of the exceptions from liability in the United States Carriage of Goods by Sea Act, Section 4 (46, U.S. Code Section 1304), more specifically 1304(c) and (d), perils of the sea and Act of God (bad seas and weather conditions) combined with servants of the carrier and the navigation or in the management of the ship in that they misjudged the location and severity of the current and squalls. They also misjudged the current, sea, swell and squalls' effect on the vessel and the weather's effect on visibility.

2. As a result of the stranding, plaintiff voluntarily made and incurred the sacrifices, disbursements and expenses of a general average nature for the common benefit and to relieve the adventure of a common peril, for payment of which defendants herein have agreed to be and are bound.

3. Plaintiff has selected the Port of New York as the Port of Adjustment and a general average adjustment has been prepared by a professional, General Average Adjuster, Despard & Co., Inc., 161 William Street, New York, New York. The apportionment of general average among the defendants in this suit made by the Adjuster is shown in Schedule A annexed hereto. The total amount of general average contribution due from the defendants is $464,979.04, plus interest.

4. Plaintiff Sea-Land Service, Inc., was at all times hereinafter mentioned the owner, pro hoc vice of the S.S. BEAUREGARD and brings this action on its behalf and on behalf of the owners, underwriters and other parties in interest.

5. The S.S. BEAUREGARD was regularly operated into the Port of Rio Haina.

6. The S.S. BEAUREGARD was inspected by a diver on or at arrival at the Port of New York on May 14, 1967. The damage described was so extensive that the voyage had to be abandoned.

7. But for the activity of RB 13, the ship would have remained where she was at the time of the initial stranding.

DEFENDANTS' CONTENTIONS

Defendants contend -

(1) That plaintiff failed to exercise due diligence to supply a seaworthy ship for this voyage and that was one of the causes of the stranding.

(2) That plaintiff is not the real party in interest because it was paid for its loss by its underwriters.

(3) That plaintiff failed to exercise due diligence in supplying a seaworthy hawser for the purpose of assisting the ship in an emergency.

(4) That the stranding was caused in part by an error of navigation of the plaintiff itself as opposed to an error of the Master, pilot or other servants of the plaintiff and therefore it was not caused by a peril of the sea or any other Carriage of Goods by Sea Act exception or immunity, in that Collie and Manolin interfered with the Pilot's judgment in entering the port and/or ordered him to enter the port before and during the time he was on the ship.

(5) That even if the ship and hawser were seaworthy and plaintiff did not intervene in the navigation there was no voluntary sacrifice as to any damage to the ship's bottom or other parts caused when the ship went on the strand in the first or second position.

(6) That any so called general average for the hull damage caused by the ship going further onto the strand, and any sacrifice or expense made prior to the efforts to remove the ship from the second position, even if voluntarily caused or incurred, are not proper general average because the efforts were not successful.

(7) That in hiring the first tug to remove the vessel from the strand, plaintiff was attempting to prevent the vessel from going further on to the strand, and that attempt failed.

(8) That in any event the underwriters of the containers are not liable to contribute to any general average because the stranding was caused in part by the act, neglect and default of the Master, mariner, pilot or servants of the carrier in the navigation or management of the ship as contended by plaintiff.

(9) That plaintiff failed to exercise due diligence to make the ship seaworthy for this voyage in that its configuration including that of the on deck containers was such that it was unsafe to enter the port of Rio Haina in expected conditions or otherwise.

(10) That plaintiff failed to exercise due diligence to make the ship seaworthy for this voyage in that its configuration as aforesaid required that it increase its rudder size and/or engine horsepower so as to compensate for the additional sail area when maneuvering in close quarters and into ports having the configuration and prevailing weather and sea conditions as Rio Haina.

4(a). The parties expect to offer the following exhibits or copies thereof in evidence. The parties reserve their rights to offer additional exhibits but only if and to the extent not reasonably foreseeable as may be necessary for rebuttal. The parties may also offer exhibits not listed herein upon written notice to all parties.

The parties shall pre-xchange and premark all exhibits in advance of trial at least 10 days in advance of trial.

PLAINTIFF'S EXHIBITS

S.S. BEAUREGARD Logs:

Smooth Deck, March 4, 1967-April 26, 1967.

Rough Deck Log, March 18, 1967-May 17, 1967.

Chief Engineer's Log, Rough and Smooth -
March 3-4 - April 7-8, 1967.

Chief Engineer's Log, Rough and Smooth -
April 8, 1967 - May 1, 1967.

Chief Engineer's Log, Rough and Smooth -
May 1, 1967 - June 7, 1967.

Smooth Chief Engineer's Extract for May 5, 1967.

Copy of vessel's Bell Book

Conversion Specifications by Robert H. Macy,
Naval Architect and Marine Engineer
dated July 30, 1967.

Photos of hull in drydock.

Photos of refloating attempts.

Statement of Captain Harold J. Boehm
dated October 6, 1969.

Chart:

Barahona to Santo Domingo with Puerto De Haina
insert chart #2652 (corrected to notice to
mariners #8 Exb. 25, 67 and insert used from
2652 used in Boehm Exb.)

Dominican Republic - Law #3003 with modification.

Stability Calculations as of sailing May 5, 1967.

Messages:

Copies of 13 Marine Radiograms from 5/6/67 to
7/8/67 - 7 pages.

Manifest San Juan - Rio Haina

Stowage Plan

Refrigerated Cargo Manifest
Damaged Box Report
Dangerous Cargo Manifest

CG 2692 Report of Vessel Casualty or Accident

Deck Log Abstract
Coast Guard Report, dated 27 June 1967 with chart.

Bethelehem Steel inspection of bottom-
dated May 16, 1967

Master's report to W.J. Scott, Marine Offices,
Sea-Land dated 12 May, 1967

Note of protest dated May 9, 1967

Capacity Plan of
Conversion of C2S-E1 to container ship
dated March 13, 1958

Capacity Plan dated July 11, 1944

Surveys:

Ganley-Briggs, Inc. dated July 28, 1967.

Ganley-Briggs, Inc. dated July 2, 1969.

Ganley-Briggs, Inc. letter dated May 9, 1969.

Drydocking Hempel paint report.

American Bureau of Shipping Reports:

Reports	Dated
SJ-1389-FBC	5/16/67
NY 5576	6/19/67
NY 5577	6/10/67

Joint survey dated May 16, 1967 and signed by:

E.F. Ganley

G. Henrick

E.J. Smith

Salvage Association London:

Report #	Dated
25140	Aug. 10, 1967
25387	Oct. 4, 1967

El Marro Marine Service & Salvage Company report,
dated May 12, 1967

American Hull Insurance Syndicate letter to
Sea-Land dated December 6, 1967.

Telex from Colla to Spitz reporting Dominican Navy
charges.

Vessel's trim and stability booklet.

Waybills for cargo destined for Baltimore and Charleston.

Transshipment agreements with:

Insurance Co. of North America

Fireman's Fund Insurance Co.

Marine Office of America

American Motorists Insurance Co.

Aetna Insurance Company

Hartford Insurance Company

Royal Insurance Company

Utica Mutual Insurance Company

The Indemnity Maine Association Co.

Federal Insurance Company

Standard Marine Insurance Co., Ltd.

Great America Insurance Co.

Albert Ullmann Maine Office, Inc.

America International Marine Company

Reliance Insurance Company

Washington General Insurance Co.

Centennial Insurance Company

New Hampshire Insurance Company

National Union Fire Insurance Company

Transcripts of following depositions

and exhibits identified therein;

Harold Boehm conducted on March 6, 1974

Efigonio Torres conducted February 24, 1975

Vergioio Antonio Rojo Calderon conducted on February 24, 1975

Julia O. Mello conducted on February 28, 1975

Statement of General AVerage prepared by Despard & Co. Inc. dated January 11, 1969

Registration papers and classification certificates for the S.S. BEAUREGARD and ship's records.

DEFENDANTS'
EXHIBITS

1. a) Statement of Torres (Spanish) 9/29/72.

b) Statement of Torres (English) 9/29/72.

2. Statement of Torres (Spanish) (no date).

3. Rojo statement (Spanish 9/28/72.

4. Specifications for conversion of a C2-S-E1 cargo ship to a type C2 - X1 container ship.

5. Deposition of Torres.

6. Deposition of Rojo.

7. Letter - Sea-Land to Despard, and Collie memo dated 5/26/67.

8. Letter - Despard to Sea-Land dated 9/18/69.

9. Letter - American Institute to Despard dated 9/17/69.

10. Letter - Sea-Land to Despard dated 3/11/68.

11. Letter - Sea-Land to Schumacher and Lindgren dated 11/22/67.

12. Letter - Despard to Sea-Land dated 11/1/67.

13. Letter - Despard to Ganly dated 10/27/67.

14. Letter - Despard to Sea-Land dated 9/7/67.

15. Letter - Despard to Sea-Land dated 8/25/67.

16. Letter - Sea-Land to Despard dated 8/25/67.

17. Letter - Sea-Land to Bethlehem Steel dated 9/8/67.

18. Letter - Despard to Sea-Land dated 9/11/67.

19. Letter - Despard to Sea-Land dated 8/17/67 with enclosures (7 pp.)

20. Letter - Sea-Land to Despard dated 8/2/67 with enclosure (tape).

21. Telex - Collie to Spitz and others dated 7/31/67.

22. Letter - Despard to Sea-Land dated 6/23/67.

23. Letter - El Morro to Sea-Land dated 5/12/67.

24. 5 pages - Telexes, etc., including Collie memo dated 5/26/67.

25. Lindsay bill dated 8/22/68.

26. Lindsay bill dated 11/15/68.

27. Letter - Despard to Lindsay dated 11/7/68.

28. Letter - Despard to Salvage Association dated 11/13/68.

29. Letter - Despard to Lindsay dated 10/28/68.

30. Letter - Despard to Ganly dated 9/30/68.

31. Rope invoice No. 3415.

32. Rope invoice No. 56365.

33. General Average adjusters notes (3 pp.)

34. A. B. S. Report dated 7/1/67 #NY-5577.

35. A. B. S. Reports dated 6/20/67 #NY-45748 and #NY-5578 and A. B. S. Report SJ-1389FPC, BA-21726, BA-21781, NY-4059, and NY-5576.

36. Joint survey report dated 5/16/67.

37. Diagram dated 7/1/67 showing replaced plates.

38. Manifest - San Juan and Rio Haina dated 5/4/67.

39. Letter - Fred S. James to Donovan, Donovan, Maloof & Walsh dated 6/12/74 (with 9 attachments).

40. Letter - Sea-Land to Despard with enclosures (8 pp.)

41. Letter - Despard to Sea-Land dated 10/4/71.

42. Boehm statement dated 10/6/69.

43. Letter - Despard to American Hull Syndicate dated 7/24/69.

44. C. G. report dated 6/30/67 with 4 attachments.

45. C. G. report dated 5/9/67.

46. ✓ Report of Dominican Navy dated 8/30/67 with translation.

47. ✓ Survey report #25140 of Salvage Association dated 8/10/67.

48. ✓ Letter - Sea-Land to Despard dated 11/3/67.

49. ✓ Salvage Association report #25387, dated 10/4/67.

50. ✓ Letter - Despard to Sea-Land dated 11/1/67.

51. ✓ Letter - Despard to Ganly dated 10/27/67.

52. ✓ Letter - Ganly to Despard dated 10/30/67.

53. ✓ Statement of Torres.

54. ✓ Mello deposition.

55. ✓ Photos of ship's bottom (22)

56. ✓ Letter - Ganly to Despard dated 5/9/69.

57. ✓ Letter - Despard to Ganly dated 6/26/69, with attachments, including Ganly letter dated 7/2/69 with sketch.

58. ✓ Letter - Ganly to Despard dated 4/25/69.

59. ✓ Letter - Ganly to Despard dated 5/9/69.

60. Two photos from newspaper.

61. ✓ Boehm deposition.

62. Drawing by Boehm.

63. ✓ Capacity plan - BEAUREGARD 3/13/58.

64. ✓ Chart of Rio Haina.

65. ✓ Bell book excerpt.

66. ✓ Chart HO 6252.

67. ✓ Chart of bottom damage.

68. ✓ Capacity plan BIENVILLE dated 7/11/44.

69. C-2 stowage plan (8 pp.).

70. Ship's plans and instructions (15 pp.).

71. Engine log 4/27/67 to 5/11/67.

72. Deck log 4/28/67 to 5/10/67.

73. Photos (small (14).

5(a)

The parties agree that the witnessses whom each party now intends to call, along with the specialty of experts to be called are as follows:

Plaintiff's Witnesses

Harold Boehm

Vergilio Antonio Rojo Calderon

Julia O. Mello

Efigonio Torres

Howard Myerson

John Roethke and/or other representatives of plaintiff and/or its underwriters

Insurance company witnesses necessary to identify documents

Captain Peterson, SAndy Hook Pilot, expert shiphandler

Professor Dan Hoffman, Naval Architect

Professor Anthony Suarez, Naval Architect

Manolin Feliz

Edward F. Ganly, Naval Architect

DEFENDANTS'
WITNESSES

1. Harold J. Boehm
2. Julio Mello
3. Efigenio Torres
4. Virgilio Rojo
5. Harry Reinecke
6. Ray Hicks
7. Professor Donn
8. Expert on hawsers
   (name to be supplied)
9. Gene Spitz

5(b)

Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each other party and to the Court.

Each party reserves the right to call as a witness any witness produced by ~~any~~ the other party and any witness necessary for rebuttal, but only of matters not reasonably anticipated.

ISSUES

Plaintiff

1. Was there a common danger and a voluntary sacrifice of some property which succeeded in benefiting the remainder.

2. Is the plaintiff entitled to recover from the defendants their respective contributions for general average, salvage and other charges as shown in the General Average Statement prepared by Despard & Co., plus interest and costs?

Defendant

1. Did Sea-Land exercise due diligence to provide a seaworthy ship and appurtenances?

2. Is Sea-Land a real party in interest? If so, to what extent?

3. Was the BEAUREGARD's bottom damage the result of a voluntary sacrifice? If so, how much?

4. Did plaintiff intervene in the navigation of the ship?

5. What are plaintiff's damages, if any?

6. Are the underwriters of the containers liable in general average if the stranding was caused by default of the master, crew or pilot?

7. Were plaintiff's efforts to remove the ship from the first position and avoid further stranding successful?

SO ORDERED:

_____
U.S.D.J.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff

By Chester L. Hooper
One State Street Plaza
New York, New York

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants

By Lawrence McKinney Jr.
161 William Street
New York, New York

SCHEDULE A

LIST OF DEFENDANTS AND THEIR ADDRESSES

1. Aetna Insurance Company
   100 William Street
   New York, New York 10038

2. American International Underwriters Corp.
   102 Maiden Lane
   New York, New York 10005

3. American International Marine Agency
   102 Maiden Lane
   New York, New York 10005

4. American Motorists Insurance Company
   90 William Street
   New York, New York 10038

5. Appleton & Cox, Inc.
   80 Maiden Lane
   New York, New York 10005

6. Atlantic Mutual Insurance Company
   45 Wall Street
   New York, New York 10005

7. Boston Old Colony Insurance Company
   80 Maiden Lane
   New York, New York 10005

8. Commercial Union Insurance Company
   127 John Street
   New York, New York 10038

9. Continental Casualty Company
   127 John Street
   New York, New York 10038

10. Crum & Forster Insurance Companies
    110 William Street
    New York, New York 10038

11. Federal Insurance Company
    90 John Street
    New York, New York 10038

12. Fireman's Fund Insurance Company
110 William Street
New York, New York 10038

13. Great American Insurance Company
99 John Street
New York, New York 10038

14. Hartford Fire Insurance Company
123 William Street
New York, New York 10038

15. Home Insurance Company
59 Maiden Lane
New York, New York 10038

16. Insurance Company of North America
79 John Street
New York, New York 10038

17. Jefferson Insurance Company
1 Park Avenue
New York, New York 10016

18. Marine Office of America
123 William Street
New York, New York 10038

19. William H. McGee & Company
111 John Street
New York, New York 10038

20. New Zealand Insurance Company
90 John Street
New York, New York 10038

21. Reliance Insurance Company
161 William Street
New York, New York 10038

22. Royal Insurance Company
150 William Street
New York, New York 10038

23. Traveler's Indemnity Company
80 John Street
New York, New York 10038

24. Talbot, Bird & Co., Inc.
156 William Street
New York, New York 10038

25. Union Insurance Society of Canton
59 John Street
New York, New York 10038

26. Continental Insurance Company
45 Wall Street
New York, New York 10005

27. Centennial Insurance Company
45 Wall Street
New York, New York 10005

28. Indemnity Marine Assurance Co., Ltd.
111 John Street
New York, New York 10038

29. National Union Fire Insurance Company
102 Maiden Lane
New York, New York 10038

30. New Hampshire Insurance Company
125 Maiden Lane
New York, New York 10038

31. Standard Marine Insurance Company, Ltd.
59 John Street
New York, New York 10038

32. Utica Mutual Insurance Company
350 Fifth Avenue
New York, New York 10003

Stipulation to Change Caption, Filed July 30, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

. x

SEA-LAND SERVICE, INC.,

Plaintiff,

-against-

AETNA INSURANCE COMPANY, et.al.,

Defendants.

72 Civ. 1170 WK

FILE COPY
WRIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA
NEW YORK
ENTERED
JUL 21 1975

. x

It is hereby stipulated and agreed by and between the attorneys for all parties that plaintiff's underwriters be added to the above-entitled action as named plaintiffs.

The addition of the underwriters changes the caption to read as follows:

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

. x

SEA-LAND SERVICE, INC.; BRITISH LAW INSURANCE CO., LTD.: ORION INSURANCE CO., LTD. "T" A/C; THE INSTITUTE OF LONDON UNDERWRITERS: UNDERWRITERS AT LLOYD'S: INSURANCE COMPANY OF NORTH AMERICA; CONTINENTAL INSURANCE CO.; FIREMAN'S FUND INSURANCE CO.; AMERICAN MOTORISTS INSURANCE CO.; CENTENNIAL INSURANCE CO.; AETNA INSURANCE COMPANY: GREAT AMERICAN INSURANCE CO., INDEMNITY MARINE ASSUR. CO.; RELIANCE INSURANCE CO.; WASHINGTON GENERAL INS. CO.; FEDERAL INSURANCE CO.; HARTFORD FIRE INSURANCE CO.; NATIONAL UNION FIRE INSURANCE CO.; NEW HAMPSHIRE INSURANCE CO.; ROYAL INSURANCE CO., LTD.; STANDARD MARINE INS. CO.; UTICA MUTUAL INSURANCE CO.; LESLIE & GODWIN, LTD.

Plaintiffs,

-against-

AETNA INSURANCE COMPANY, et.al.,

Defendants.

72 Civ. 1170 WK

. x

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs

By _____
A Member of the Firm

One State Street Plaza
New York, New York 10004

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants

By _____
A Member of the Firm

161 William Street
New York, New York 10038

Dated: New York, New York

SO ORDERED: 7-28-75

_____
U. S. D. J.

Proposed Findings of Fact Submitted on Behalf of Plaintiff, Dated October 31, 1975

FILE COPY
10/31/75
ENTERED

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SEA-LAND SERVICE, INC., et. al.,

Plaintiff,

-against-

AETNA INSURANCE CO., et. al.,

Defendants.

72 civ 1170 WK

72 civ 1875

PROPOSED FINDINGS OF FACT SUBMITTED ON BEHALF OF PLAINTIFF

SEA-LAND SERVICE, INC., et.al.,

Plaintiff,

-against-

NEW HAMPSHIRE INSURANCE CO., THE HANOVER INSURANCE CO., FIREMAN'S INSURANCE CO., OF N.Y.,

Defendants.

1. The owners of the S.S. Beauregard exercised due diligence to make the vessel seaworthy to be assigned to a route which included the Port of Rio Haina. The vessel handled well and had made previous calls at the same port without incident.

2. The Master of the s/s Beauregard attempted to enter the Port of Rio Haina with the assistance of a professional Rio Haina pilot. After aborting one approach because of poor visibility, the two master mariners decided it was clear enough to enter the harbor.

3. The vessel owner's agent, who was ashore, did not interfere with the navigation of the vessel as she attempted to enter the Port. The vessel's Master maintained command and actual control over his vessel during the entire period.

4. The vessel was struck by unexpected winds and currents and by sudden rain squalls which obscured visibility just as the vessel approached the entrance.

The grounding was caused by the effect of the natural forces upon the vessel and any miscalculation by the master and pilot was not the result of negligence on their part.

5. After the vessel grounded at 1813, May 5, 1967, her cargo, containers and the vessel were endangered by a common peril until they were finally floated free at 2108, May 8, 1967.

6. While the vessel was in her first position immediately after the stranding with her bow embedded in the breakwater, she was subject to obvious perils. She could have been holed and broken where she was, as had another vessel previously, and all might have been lost.

7. The Master could have come ahead with the engines and hard left rudder in an effort to hold the vessel in her initial position until an additional tug boat arrived in one and one half hours, or until large salvage tugs arrived from San Juan,Puerto Rico, in 17 hours. However, the risk of waiting was great, in view of her perilous position.

8. The Master decided to take immediate action to try to free the vessel with the one available tug.

9. The Master realized that if the attempt failed, the vessel could find herself in a worse position temporarily, but he intentionally took that risk rather than waiting.

10. The vessel did not move or break free until the tug started to pull, when her bow was felt coming free.

11. The tug pulled for about 10 minutes at full power and then the line broke. The line was seaworthy. Breaking of lines under such great stresses is not unusual.

12. The tug was not negligent as it was operating in heavy swells under very difficult circumstances.

13. After the line broke, the vessel was pushed sideways by the weather and currents, sustaining damage to her port side and bottom. Additional damage was caused during the long effort by several tugs and shifting of ballast which finally succeeded in re-floating her.

14. No cargo was jellisoned and no cargo was lost or damaged during the salvage effort.

15. The refloating expenses incurred by the shipowner and refloating damage sustained by the vessel were general average sacrifices.

16. General average was declared but defendant's cargo underwriters refused to honor their general average agreements and guarantees.

17. The plaintiff's container underwriters also failed to honor their guarantees.

18. The parting of the line was a foreseeable risk. The pulling considerably increased the possibility that the vessel might shift position and ground on her port side. The Captain's acts were intentional. What he did was necessary to save the ship and cargo.

19. The Captain acted reasonably in trying to get off as fast as possible. His efforts in the end were successful, and cargo escaped all harm.

20. The sacrifices of the owner, the expenses incurred and the exposure of the vessel to further grounding, was intentional and the operation was successful. The peril was escaped for all concerned.

CONCLUSION OF LAW

There was a valid general average, and defendants must pay their general average contributions, totalling $489,808.39, plus interest from the date the adjustment was made.

RESPECTFULLY SUBMITTED,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff
By

A Member of the Firm
One State Street Plaza
New York, New York,
10004

**Findings of Fact Proposed by Defendants,
Dated November 3, 1975**

3281-12 DeO CDH

FILE COPY
HAIGHT, GARDINER, POOR & HAVENS
ONE STATE STREET PLAZA NEW YORK
11/3/75
ENTERED
RE
BY:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEA-LAND SERVICE, INC., et al.,

Plaintiffs,

-against-

AETNA INSURANCE COMPANY, et al.,

Defendants.

72 Civ 1170 WK

SEA-LAND SERVICE, INC., et al.,

Plaintiffs,

-against-

NEW HAMPSHIRE INSURANCE COMPANY, THE HANOVER INSURANCE COMPANY, FIREMAN'S INSURANCE COMPANY OF NEW YORK,

Defendants.

72 Civ 1875 WK

FINDINGS OF FACT
PROPOSED BY DEFENDANTS

1. The SS BEAUREGARD, 468 feet, 8-1/2 inches in length, 72 feet in width and 40 feet, 1-7/8 inches in depth was operated in 1967 by plaintiff, Sea-Land Services, Inc. in foreign trade.

2. She was built in 1943 as a break-bulk cargo carrier.

3. In 1957, she was converted into a container carrier in order to join the lucrative container trade.

4. She was re-designed to carry two tiers of 40 foot containers on her deck aft and one tier forward.

5. As aresult of her design changes, her sail area was increased about 88 percent.

6. Sail area is that part of the side surface of a ship upon which the wind has an effect.

7. During the conversion no change was made in the rudder size, or the motor power of the ship.

8. On the instant voyage, she sailed on April 28, 1967 from New York, laden with cargo in containers and thence from San Juan with a full load of containers, bound for Rio Haina, in the Dominican Republic.

9. While the ship at that time carried a full load of containers, some were empty, or partly-loaded, and the ship which could carry 5,945 tons carried only 4,194 tons.

10. Because she was lighter her sail area was further increased.

11. Rio Haina is a small port in the Dominican Republic not far from Santo Domingo. The inner harbor is protected from the effect of prevailing easterly winds and currents which run across its mouth by two artificial breakwaters which are in turn protected by huge blocks of concrete which were placed on the outer sections of the east and west breakwater.

12. Between the breakwaters there is a narrow inlet of some 420 feet width. The navigational channel in its center is approximately 210 feet wide.

13. The Caption of the BEAUREGARD experienced considerable difficulty in approaching the entry to the port because of adverse weather and sea conditions.

14. He made his first approach for the purpose of entering the harbor without the compulsory pilot but he was forced to abort because of the weather.

15. He subsequently made a second approach into the harbor, this time with Pilot Torres and it was also aborted because of the prevailing weather conditions.

16. Before making the third approach, which led to the casualty, Torres was contacted on the radio-phone by Mr. Collie, Manager for Sea-Land's Dominican operations. Collie was calling from the Harbormaster's office since Sea-Land did not have a radio-phone at its offices.

17. The substance of the message from Collie to Torres was that the visibility had improved and that, therefore, Torres should bring the ship in.

18. He reminded Torres that a tug and stevedores had been ordered for 6:00 P.M. It does appear that Torres could see the breakwater in making this third approach but it is quite evident from the testimony and other descriptions of eyewitnesses that the overall weather conditions had not substantially improved.

19. There was a stationary front with further squalls from the east. In view of the position of Collie, both in the Dominican Republic and with Sea-Land, vis-a-vis, the position of Torres, it is clear that the radio-phone message received from Collie by Torres was tantamount to an order to the pilot to bring the vessel in, in spite of the adverse weather.

20. It was Torres' judgment that the weather conditions were not appropriate to bring in a ship with the height of the BEAUREGARD.

21. Sea-Land itself, through its managing operator, Mr. Collie intervened in Torres' judgment and ordered the ship into port.

22. Collie's motivation was economic in that Sea-Land

had a tug and stevedoring personnal standing by and since the sun had already set the ship would have had to remain steaming at sea all night.

23. Torres proceeded to make the approach into the channel about 15 minutes after the sun had set using the breakwater as a guide.

24. The Coast Guard noted in its narrative that the navigational aids for the harbor are unreliable.

25. The navigational aids are at Rio Haina and are maintained by Sea-Land and were put there at its request.

26. The chart (#HO 2652) used by the master shows the ranges to be missing and contains a caution reading:

> "The color and position of buoys should not be depended upon".

27. After describing the missing lights and extinguished lights, the Coast Guard report states:

> "This existing condition of navigational aids makes a darkness entry to the harbor too hazardous to be considered."

28. Nevertheless, subliminating his sound fears, Torres obeyed Collie and started to enter the narrow channel in enveloping darkness in spite of high winds, heavy seas and a cross current all acting upon the ship's portside.

29. The wind and sea conditions caused the ship to drift to port.

30. Becoming alarmed Torres ordered "hard right rudder" but the ship failed to respond.

31. A contributing cause of her move to port was insufficient rudder size and engine power for a vessel having her enormous sail area.

32. Torres let go the starboard anchor and ordered full astern, but the ship stranded by the bow about 20 feet west of the west breakwater.

33. Her port bow was up against a wrecked tanker.

34. Pilot Torres blew a danger signal requesting assistance and tug RP 12 was at the scene within ten minutes.

35. Before the tug arrived the master called for full astern in an effort to release the ship through its own power.

36. When the RP 12 arrived she was directed to the starboard quarter and the ship attached to her a manila hawser. The tug took up the slack and pulled for ten minutes at the same time that the ship's engines were full astern.

37. The ship's stern was moving slowly to port when the hawser parted at 1833 hours.

38. By 2015 hours the wind and the sea had forced the ship to port and further onto the shoal area.

39. This movement caused almost all of the damage to the bottom of the ship and none of that damage was caused by any movement to starboard.

40. Boehm, Torres, Mello, Rojo and Collie all feared the ship would be forced further on the beach to port if nothing were done, and

that movement was going to happen if no salvage attempt was made.

41. Plaintiffs' contention that it "intentionally" damaged its own ship is an afterthought contrived for general average purposes and without any support in the evidence; the damage was accidental particular average damage.

42. Ganly's opinion that the ship would not have moved from Position A had no salvage been attempted is out-weighed by the testimony of the people aboard the ship at the time and in the immediate vicinity, including a high ranking supervisory officer of Sea-Land.

43. Ganly's opinion that the ship could have been held at Position A had the master wished to is contrary to the evidence and in any event unfounded because he lacked material information.

44. The vessel was refloated at 2108 hours on May 8, 1967.

45. She remained underway at sea all night until the next morning and then entered Rio Haina at daybreak without a compulsory pilot.

46. None of the bottom damage to the ship is proper general average since they were neither sacrificial nor caused by the direct consequence of a general average act.

47. Because of the geographic features of Rio Haina and with the BEAUREGARD's docking area very close to the entrance channel, the BEAUREGARD was compelled to proceed through the channel at a slower than desirable speed.

48. The wind had a greater effect upon the ship's sail area because of the slow speed.

49. The stranding of the ship was caused by her unseaworthy condition which was the result of insufficient rudder power and engine power when compared with her increased sail area. Contributing causes of the stranding was the poor judgment of Collie in ordering her to enter Rio Haina in bad weather in the enveloping darkness without the existence of proper navigational aids, and the slow vessel entry speed which port geography required.

50. Mr. Collie coerced witnesses Torres and Rojo to give false statements.

51. Feliz (Manolin) was not a credible witness.

52. Containers are not goods for the purpose of the Jason clause.

Dated: October 31, 1975

Respectfully submitted,

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants
By: _____

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA NEW YORK
2/10/76
ENTERED
RE:
BY:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEA-LAND SERVICE, INC., et al.,

Plaintiff,

- against -

AETNA INSURANCE CO., et al.,

Defendants.

72 Civ. 1170

#43863

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OPINION

SEA-LAND SERVICE, INC., et al.,

Plaintiff,

- against -

NEW HAMPSHIRE INSURANCE CO., THE HANOVER INSURANCE CO., FIREMAN'S INSURANCE CO., OF N.Y.,

Defendants.

72 Civ. 1875

FILED
FEB 10 9 48 AM '76
U.S. DISTRICT COURT
S.D.N.Y.

A P P E A R A N C E S :

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs
One State Street Plaza
New York, New York 10004
By: M. E. DE ORCHIS
CHESTER D. HOOPER
Of Counsel

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants
161 William Street
New York, New York 10038
By: DAVID L. MALOOF
DONALD M. KENNEDY
Of Counsel

KNAPP, D.J.

FINDINGS OF FACT

I.

(1) The defendants have not met their burden of proving the ship unseaworthy.

(2) The ship was not improperly constructed.

(3) It was not foreseeable when the ship started her voyage that she was not suitable for entry into the Port of Rio Haina.

(4) Defendants have abandoned the claim that the hawser was unseaworthy.

II.

(5) The defendant has not established that the vessel's owner interfered with the navigation of the ship.

(6) Mr. Collie did not order the pilot (Mr. Torres) to bring the ship in.

(7) Defendants did not establish that Pilot Torres interpreted any message he may have received from Mr. Collie as an or to enter the harbor.

III.

(8) It is more likely than not that the ship would have shifted roughly to "position B", regardless of whether the tow had been attempted. This finding is based on the evidence of wind and current and the testimony of eyewitnesses.

(9) In light of finding 8, had the tow not beer attempted at least the damage actually suffered would have occurred.

(10) It was not open to the master to attempt to hold the ship in "position A" by using "full ahead" power and thus driving her further on to the rocks.

(11) The master used good seaman's judgment in attempting the tow.

(12) The master's action in attempting the tow in no way increased the danger to the ship.

(13) In addition to the foregoing, we incorporate by reference plaintiff's proposed findings Nos. 1-6, 8, 11-14 and defendant's proposed findings Nos. 1-3, 10, 13-17, 33-36, 44-45 [See Appendix A & B]

CONCLUSIONS OF LAW

Based on the foregoing, it is my conclusion that no claim for general average was ~~xxx~~ established. In this connection, it seems to me that Findings 8 and 9 are controlling. In other words, the situation is the obverse of the situation before me in Starlight Trading, Inc. v. S.S. "San Francisco" Maru (S.D.N.Y. 1974) 1974 A.M 1523. There I sustained a claim of general average on a finding th but for the sealing of the hatches (the general average act there involved) the cargo there in question would not have suffered smoke damage. Here I reject a claim of general average upon a finding th

it is more probable than not that the damage actually suffered would have occurred even if the tow had not been attempted. From this point of view the case seems to be on all fours with the Major William H. Tantum (2d Cir. 1891) 49 Fed. 252. There, as here, substantially the same damage would have occurred whether or not the general average act had been attempted.

Let the defendant submit an order on five days' notice.

Dated: New York, New York
February 4, 1976.

WHITMAN KNAPP, U.S.D.J.

PLAINTIFF'S PROPOSED FINDINGS OF FACT.

1. The owners of the S.S. Beauregard exercised due diligence to make the vessel seaworthy to be assigned to a route which included the Port of Rio Haina. The vessel handled well and had made previous calls at the same port without incident.

2. The Master of the s/s Beauregard attempted to enter the Port of Rio Haina with the assistance of a professional Rio Haina pilot. After aborting one approach because of poor visibility, the two master mariners decided it was clear enough to enter the harbor.

3. The vessel owner's agent, who was ashore, did not interfere with the navigation of the vessel as she attempted to enter the Port. The vessel's Master maintained command and actual control over his vessel during the entire period.

4. The vessel was struck by unexpected winds and currents and by sudden rain squalls which obscured visibility just as the vessel approached the entrance.

The grounding was caused by the effect of the natural forces upon the vessel and any miscalculation by the master and pilot was not the result of negligence on their part.

5. After the vessel grounded at 1813, May 5, 1967, her cargo, containers and the vessel were endangered by a common peril until they were finally floated free at 2108, May 8, 1967.

6. While the vessel was in her first position immediately after the stranding with her bow embedded in the breakwater, she was subject to obvious perils. She could have been holed and broken where she was, as had another vessel previously, and all might have been lost.

8. The Master decided to take immediate action to try to free the vessel with the one available tug.

11. The tug pulled for about 10 minutes at full power and then the line broke. The line was seaworthy. Breaking of lines under such great stresses is not unusual.

12. The tug was not negligent as it was operating in heavy swells under very difficult circumstances.

13. After the line broke, the vessel was pushed sideways by the weather and currents, sustaining damage to her port side and bottom. Additional damage was caused during the long effort by several tugs and shifting of ballast which finally succeeded in refloating her.

14. No cargo was jellisoned and no cargo was lost or damaged during the salvage effort.

DEFENDANT'S PROPOSED FINDINGS OF FACT:

1. The SS BEAUREGARD, 468 feet, 8-1/2 inches in length, 72 feet in width and 40 feet, 1-7/8 inches in depth was operated in 1967 by plaintiff, Sea-Land Service, Inc. in foreign trade.

2. She was built in 1943 as a break-bulk cargo carrier.

3. In 1957, whe was converted into a container carrier in order to join the lucrative container trade.

10. Because she was lighter her sail area was further increased.

13. The Captain of the BEAUREGARD experienced considerable difficulty in approaching the entry to the port because of adverse weather and sea conditions.

14. He made his first approach for the purpose of entering the harbor without the compulsory pilot but he was forced to abort because of the weather.

15. He subsequently made a second approach into the harbor, this time with Pilot Torres and it was also aborted because of the prevailing weather conditions.

16. Before making the third approach, which led to the casualty, Torres was contacted on the radio-phone by Mr. Collie, Manager for Sea-Land's Dominican operations. Collie was called from the Harbormaster's office since Sea-Land did not have a radio-phone at its offices.

17. The substance of the message from Collie to Torres was that the visibility had improved and that, therefore, Torres should bring the ship in.

33. Her port bow was up against a wrecked tanker.

34. Pilot Torres blew a danger signal requesting assistance and tug RP 12 was at the scene within ten minutes.

35. Before the tug arrived the master called for full astern in an effort to release the ship through its own power.

36. When the RP 12 arrived she was directed to the starboard quarter and the ship attached to her a manila hawser. The tug took up the slack and pulled for ten minutes at the same time that the ship's engines were full astern.

44. The vessel was refloated at 2108 hours on May 8, 1967.

45. She remained underway at sea all night until the next morning and then entered Rio Haina at daybreak without a compulsory pilot.

Judgment Dated March 17, 1976 Which Incorporated a Post-Trial Stipulation, Dated February 10, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

SEA-LAND SERVICE, INC.; BRITISH LAW INSURANCE CO., LTD.; ORION INSURANCE CO., LTD. "T" A/C; THE INSTITUTE OF LONDON UNDERWRITERS; UNDERWRITERS AT LLOYD'S; INSURANCE COMPANY OF NORTH AMERICA; CONTINENTAL INSURANCE CO.; FIREMAN'S FUND INSURANCE CO.; AMERICAN MOTORISTS INSURANCE CO.; CENTENNIAL INSURANCE CO.; AETNA INSURANCE COMPANY; GREAT AMERICAN INSURANCE CO.; INDEMNITY MARINE ASSUR. CO.; RELIANCE INSURANCE CO.; WASHINGTON GENERAL INS. CO.; FEDERAL INSURANCE CO.; HARTFORD FIRE INSURANCE CO.; NATIONAL UNION FIRE INSURANCE CO.; NEW HAMPSHIRE INSURANCE CO.; ROYAL INSURANCE CO., LTD.; STANDARD MARINE INS. CO.; UTICA MUTUAL INSURANCE CO.; LESLIE & GODWIN, LTD.

Plaintiffs,

JUDGMENT

- against -

73 Civ. 1170 (W.K.)

AETNA INSURANCE COMPANY, AMERICAN INTERNATIONAL UNDERWRITERS CORP., AMERICAN INTERNATIONAL MARINE AGENCY, AMERICAN MOTORIST'S INSURANCE COMPANY, APPLETON & COX, INC., ATLANTIC MUTUAL INSURANCE COMPANY, BOSTON OLD COLONY INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CRUM & FORSTER INSURANCE COMPANIES, FEDERAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, JEFFERSON INSURANCE COMPANY, MARINE OFFICE OF AMERICA, WILLIAM H. McGEE & COMPANY, NEW ZEALAND INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INSURANCE COMPANY, TRAVELER'S INDEMNITY COMPANY, TALBOT, BIRD & COMPANY, INC., UNION INSURANCE SOCIETY OF CANTON, CONTINENTAL INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, INDEMNITY MARINE ASSURANCE COMPANY, LTD., NATIONAL UNION FIRE INSURANCE COMPANY, NEW HAMPSHIRE

INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., and UTICA MUTUAL INSURANCE COMPANY,

Defendants.

----------x

SEA-LAND SERVICE, INC.,

Plaintiff,

- against - 72 Civ. 1185 (W.K.)

NEW HAMPSHIRE INSURANCE COMPANY, THE HANOVER INSURANCE COMPANY, FIREMAN'S INSURANCE COMPANY OF NEW YORK,

Defendants.

----------x

This action having come on trial before this Court, the Honorable Whitman J. Knapp, District Judge presiding, and the issues having been duly tried, and a decision having been duly rendered on February 4, 1976, and the annexed post-trial stipulation of damages having been duly entered into on February 10, 1976, it is

ORDERED, ADJUDGED AND DECREED that the above mentioned plaintiffs recover of the above mentioned defendants the sum of $54,231.17, and it is further

ORDERED, ADJUDGED AND DECREED that the above mentioned plaintiffs recover of the above mentioned defendants interest on the sum of $54,231.17 at the rate of 6% per annum from February 1, 1968 until February 29, 1976 in the amount of $23,048.23 and thereafter at the rate of $9.00 per day until entry of this judgment, and it is further

ORDERED, ADJUDGED AND DECREED that the parties herein shall each bear their own costs.

Dated: New York, New York
March 19, 1976

Whitman Knapp
WHITMAN J. KNAPP
UNITED STATES DISTRICT JUDGE

Judgment entered, this day
of , 1976.

We consent to the entry of the foregoing order without further notice.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs

BY _____

One State Street Plaza
New York, New York 10004

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants

BY _____

161 William Street
New York, New York 10038

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SEA-LAND SERVICE, INC., et al., Plaintiff,	:	POST-TRIAL STIPULATION
-against-	:	72 Civ. 1170 (W.K.)
AETNA INSURANCE CO., et al., Defendants.	:	
SEA-LAND SERVICE,INC., et al., Plaintiff,	:	
-against-	:	72 Civ. 1875 (W.K.)
NEW HAMPSHIRE INSURANCE CO., THE HANOVER INSURANCE CO., FIREMAN'S INSURANCE CO., OF N.Y. Defendants.	:	

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties to the above entitled action that:

For the purpose of this stipulation, the term "seaworthy" means that the Court has found that either (a) the Beauregard was seaworthy, or (b) the vessel's owners exercised due diligence to make the Beauregard seaworthy as required by 46 U.S.C. §§ 1303 (1) and 1304 (1) and the cases construing the sections.

For the purpose of this stipulation, the term "unseaworthy" means that the Court has found that the vessel's owners failed to exercise due diligence to make the Beauregard seaworthy as required by 46 U.S.C. §§ 1303 (1) and 1304 (1) and the cases construing the sections.

For the purpose of this stipulation, the term "actionable fault" means fault of the vessel owner and/or those acting for its owner, i.e. certain shore personnel, which under the terms of the contract of carriage (Pl. Ex. 6A and 6B) would prevent plaintiffs from successfully invoking the New Jason Clause to recover in general average.

(1) If unseaworthiness or actionable fault caused the stranding, then cargo pays nothing.

(2) If the vessel was seaworthy, and if non-actionable fault or no fault caused the stranding, and if the bottom damage is not general average damage, then cargo pays $54,211.31.

(3) If the vessel was seaworthy, and if non-actionable fault or no fault caused the stranding, and if the bottom damage is general average damage, then cargo pays $404,002.26.

(4) If the vessel was seaworthy or unseaworthy (seaworthiness is admitted), and if actionable fault other than unseaworthiness caused the stranding, then containers pay nothing.

(5) If the vessel was seaworthy or unseaworthy (seaworthiness is admitted), and if non-actionable fault or no fault caused the stranding, and if the bottom damage is not general average damage, then containers pay $19.86.

(6) If the vessel was seaworthy or unseaworthy (seaworthiness is admitted), and if non-actionable fault or no fault caused the stranding, and if the bottom damage is general average damage, then containers pay $74,814.53.

Dated: New York, New York
February 10, 1976

BEST COPY AVAILABLE

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs,

By _____
One State Street Plaza
New York, New York 10004

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Defendants,

By _____
161 William Street
New York, New York 10038

Notice of Appeal, Dated March 30, 1976

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA, NEW YORK
3/30/76
ENTERED

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

. . . . . .

SEA-LAND SERVICE, INC.: BRITISH LAW INSURANCE CO., LTD. ; ORION INSURANCE CO., LTD. "T" A/C; THE INSTITUTE OF LONDON UNDERWRITERS; UNDERWRITERS AT LLOYD'S; INSURANCE COMPANY OF NORTH AMERICA; CONTINENTAL INSURANCE CO.; FIREMAN'S FUND INSURANCE CO.; AMERICAN MOTORISTS INSURANCE CO.; CENTENNIAL INSURANCE CO.; AETNA INSURANCE COMPANY: GREAT AMERICAN INSURANCE CO.; INDEMNITY MARINE ASSUR. CO.; RELIANCE INSURANCE CO.; WASHINGTON GENERAL INS..CO.; FEDERAL INSURANCE CO.; HARTFORD FIRE INSURANCE CO. ; NATIONAL UNION FIRE INSURANCE CO.; NEW HAMPSHIRE INSURANCE CO. ; ROYAL INSURANCE CO.;LTD.; STANDARD MARINE INS. CO.; UTICA MUTUAL INSURANCE CO.; LESLIE & GODWIN, LTD.

Plaintiffs,

-against-

AETNA INSURANCE COMPANY, AMERICAN INTERNATIONAL UNDERWRITERS CORP., AMERICAN INTERNATIONAL MARINE AGENCY, AMERICAN MOTORIST'S INSURANCE COMPANY, APPLETON & COX, INC., ATLANTIC MUTUAL INSURANCE COMPANY, BOSTON OLD COLONY INSURANCY COMPANY, COMMERCIAL UNION INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CRUM & FORSTER INSURANCE COMPANIES, FEDERAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, JEFFERSON INSURANCE COMPANY, MARINE OFFICE OF AMERICA, WILLIAM H. McGEE & COMPANY, NEW ZEALAND INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INSURANCE COMPANY, TRAVELER'S INDEMNITY COMPANY, TALBOT, BIRD & COMPANY, INC., UNION INSURANCE SOCIETY OF CANTON, CONTINENTAL INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, INDEMNITY MARINE ASSURANCE COMPANY, LTD., NATIONAL UNION FIRE INSURANCE COMAPNY, NEW HAMPSHIRE INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., and UTICA MUTUAL INSURANCE COMPANY,

Defendants.

. x

NOTICE OF APPEAL

72CCiv. 1170 (W.K.)
(judgment #76,240)

. x

SEA-LAND SERVICE, INC.,

Plaintiff,

-against-

NEW HAMPSHIRE INSURANCE COMPANY, THE HANOVER INSURANCE COMPANY, FIREMAN'S INSURANCE COMPANY OF NEW YORK. 72 Civ. 1185(W.K.)

Defendants.

. x

Notice is hereby given that plaintiffs, above named, hereby appeal to the United States Court of Appeals for the Second Circuit from that part of the final judgment entered in this action on March 19, 1976, which failed to grant plaintiffs recovery in General Average for damage to the S.S. BEAUREGARD sustained after the tow line parted.

Dated: New York, New York

March 26, 1976

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff,
SEA-LAND SERVICE, INC. et al.

By _____
A Member of the Firm
One State Street Plaza
New York, New York 10004

TO:
Clerk of the United States
District Court for the Southern
District of New York
U.S. Court House
Foley Square
New York, New York

Donovan, Donovan, Maloof & Walsh
Attorneys for Defendants
161 William Street
New York, New York 10038

3281-12 Deo-CDH. 3:21-12

FORM C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILE COPY

RECEIVED

CIVIL APPEAL PRE-ARGUMENT STATEMENT
BY: 4-9-76

(To be filed by appellant with Clerk of Court of Appeals and served on other parties within ten days after filing notice of appeal.)

(Attach additional sheets if space is not sufficient)

APPEAL FROM DISTRICT COURT

CASE TITLE (Complete)

Sea-Land Service, Inc., et al.,
Plaintiffs
-against-
Aetna Insurance Company, et al.
Defendants.

DISTRICT ▶	S. D. N. Y.
DISTRICT COURT DOCKET NUMBER ▶	72 Civ. 1170 W.K.
DATE FILED IN DISTRICT COURT ▶	MO. DAY YEAR 3 19 1976
DATE NOTICE OF APPEAL FILED ▶	3 30 1976
~~OTHER~~ CASE(S) ▶	Consolidated 72 Civ. 1875

Is this a cross appeal YES ☐ NO ☒

COUNSEL NAME FOR APPELLANTS:	ADDRESS	TELEPHONE
Haight, Gardner, Poor & Havens	One State Street Plaza New York, N.Y. 10004	344-6800
FOR APPELLEES:		
Donovan, Donovan, Maloof & Walsh	161 William Street New York, N.Y. 10038	964-3553

Filed 4-9-76

(Check One Box Only)

NATURE OF SUIT

CONTRACT
- ☐ INSURANCE
- ☒ MARINE
- ☐ MILLER ACT
- ☐ NEGOTIABLE INSTRUMENT
- ☐ RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
- ☐ OTHER CONTRACT

REAL PROPERTY
- ☐ CONDEMNATION
- ☐ FORECLOSURE
- ☐ RENT LEASE & EJECTMENT
- ☐ TORTS TO LAND
- ☐ ALL OTHER REAL PROPERTY

TORTS

PERSONAL INJURY
- ☐ AIRPLANE
- ☐ ASSAULT, LIBEL & SLANDER
- ☐ FEDERAL EMPLOYEE LIABILITY
- ☐ MARINE
- ☐ MOTOR VEHICLE
- ☐ OTHER PERSONAL INJURY

PERSONAL PROPERTY
- ☐ FRAUD
- ☐ OTHER PERSONAL PROPERTY DAMAGE

ACTIONS UNDER STATUTES

CIVIL RIGHTS
- ☐ VOTING
- ☐ JOBS
- ☐ ACCOMODATIONS
- ☐ WELFARE
- ☐ OTHER CIVIL RIGHTS

PRISONER PETITIONS
- ☐ VACATE SENTENCE (2255)
- ☐ PAROLE BRD. REVIEW
- ☐ HABEAS CORPUS
- ☐ MANDAMUS
- ☐ CIVIL RIGHTS

FORFEITURE/PENALTY
- ☐ AGRICULTURE
- ☐ FOOD & DRUG
- ☐ LIQUOR LAWS
- ☐ R.R. & TRUCK
- ☐ AIR LINE REGS.
- ☐ OTHER

LABOR
- ☐ FAIR LABOR STANDARDS
- ☐ LABOR/MGMT. RELATIONS
- ☐ LABOR/MGMT. REPORTING & DISCLOSURE ACT
- ☐ RAILWAY LABOR ACT
- ☐ OTHER LABOR LITIGATION

PROPERTY RIGHTS
- ☐ COPYRIGHT
- ☐ PATENT
- ☐ TRADEMARK

OTHER STATUTES
- ☐ STATE RE-APPORTIONMENT
- ☐ ANTI-TRUST
- ☐ BANKRUPTCY TRUSTEE
- ☐ BANKS AND BANKING
- ☐ COMMERCE ICC RATES, ETC.
- ☐ DEPORTATION
- ☐ SELECTIVE SERVICE
- ☐ SECURITIES COMMODITIES EXCHANGE
- ☐ SOCIAL SECURITY
- ☐ TAX SUITS
- ☐ AGRICULTURAL ACTS
- ☐ ECONOMIC STABILIZATION ACT
- ☐ ENVIRONMENTAL MATTERS
- ☐ CONSTITUTIONALITY OF STATE STATUTES
- ☐ NARA, TITLE III
- ☐ OTHER STATUTORY ACTIONS

METHOD OF DISTRICT COURT DISPOSITION

Judgment before trial:
- Summary Judgment ☐
- Dismissal ☐
- Other ☐

Judgment during or after trial:
- Court trial ☒
- Jury trial ☐
- During trial ☐

Appeal from order:
- Preliminary injunction ☐
- Class action ☐
- Amend answer ☐
- Enforce settlement ☐
- Counsel fees ☐
- Stay ☐
- Other ☐

Prisoner petition:
- Granted ☐
- Denied ☐

Injunction:
- Granted ☐
- Denied ☐

Damages:
- Granted ☒
- Amount $54,231.17
- Denied ☒

Other relief (specify)
$424,585.62 representing cargo's and containers' contribution in G.A. to damage vessel sustained after tow line parted.

APPROXIMATE SIZE OF RECORD ▶ 430 pages NUMBER OF EXHIBITS ▶ 44

HAS TRANSCRIPT BEEN MADE? YES ☒ NO ☐

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT BELOW: Vessel sought General Average contribution from cargo and containers for their share of sacrifices vessel made to save cargo, containers and vessel after running aground. The trial court concluded that no claim for General Average occurred. However, the parties agreed that the Court's findings of fact mandated an award in general average for the expenses of towing the vessel from the strand and consented to entry of a judgment for this expense. The Court denied contribution for the damage inflicted on the vessel during the salvage operation after the tow line parted.

the vessel from the strand and consented to entry of a judgment for this expense. The Court denied contribution for the damage inflicted on the vessel during the salvage operation after the tow line parted.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

Was the damage suffered by the S.S. Beauregard during salvage operations after a tow line parted a General Average sacrifice?

I, Attorney for the Appellant, hereby certify that satisfactory arrangements have been made with the court reporter for payment of the cost of the transcript (FRAP 10 (b). (Check one box)

I ☒(1) have already ordered the transcript to be prepared OR

☐(2) will order it to be prepared at the time required by the Staff Counsel in the implementation of the Civil Appeals Management Plan.

HAIGHT, GARDNER, POOR & HAVENS

COUNSEL'S SIGNATURE By _____ DATE

M. E. DeOrchis
One State Street Plaza
New York, New York 10004

Civil Appeal Pre-Argument Statement,
Dated April 9, 1976

Relevant Portions of the Stenographer's Minutes of the Trial

JULIO MELLO, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DE ORCHIS:

Q By whom are you employed at the present time?

A At the present time I am employed by the Puerto Rico Marine Management Incorporated.

Q In what capacity?

A Vice-president of operations for Puerto Rico.

THE COURT: Does that have anything to do with Sealand?

THE WITNESS: No, sir, Puerto Rico Marine Management Inc. is a subsidiary of R.J. Reynolds completely separate from Sealand.

Q In May of '67 by whom were you employed?

A Sealand Service.

Q What was your capacity at that time?

A At that time I was marine manager.

Q What does that mean, marine manager?

A I was responsible for loading, discharging, vessel operations, husbanding ships, maintenance and repairs that took place in the Caribbean.

Q Was that the entire Caribbean?

A Yes, sir.

Q Captain, would you tell us something of your background. Have you ever gone to sea?

A Yes, sir, I have.

Q Would you tell us what your experience is at sea, that is when did you start going to sea?

A I started back in Chile when -- I was born and raised in Chile as a student and I came to the United States and sailed during the war. After the war I sailed with Grace Lines. I sailed as master for Grace Lines under New York, West Coast, South America, Caribbean.

I sailed for Central Gulf Line to New Orleans, Middle East and I have sailed as master for Sealand Service prior to my shore appointment.

Q All together how many years have you spent in the marine industry?

A Since I started, 36 years, sir.

Q What experience haveyou had before the BEAUREGARD incident in the salvaging of ships which are grounded?

A Well, I was -- I have been aground myself as master. I was also technical advisor for the Government of Colombia and I was involved in two or three salvages in the Port of Colombia.

THE COURT: How many times were you aground yourself?

THE WITNESS: Once, sir.

Q Captain, I show you these charts. Can I have this marked for identification.

(Plaintiff's Exhibit 1 marked for identification)

Q I show you Plaintiff's Exhibit 1 marked for identification, Chart No. 2652, and ask you whether the Port of Rio Haina or the Port of Haina in Santo Domingo is shown on this chart.

A Yes, sir.

Q Would you point to it?

A The upper left-hand corner.

Q You are pointing to the enlargement in the upper left-hand corner?

A Yes, sir.

Q Would you show us on the map itself where is the port?

A It is over here on the right-hand side.

THE COURT: This is a blowup of that section?

THE WITNESS: That is right, sir.

MR. DE ORCHIS: I offer the chart in evidence as Plaintiff's Exhibit 1.

MR. MALOOF: Has this been identified and marked in a previous deposition?

MR. DE ORCHIS: Yes.

MR. MALOOF: Marked on Captain Boehm's deposition?

MR. DE ORCHIS: Yes.

MR. MALOOF: Are you sure this is the same one?

MR. DE ORCHIS: This is the official chart.

MR. MALOOF: Would you get the one marked on Captain Boehm's deposition, please? I would like to compare it, after which I will probably have no objection.

I am afraid I will have to object to the document. This chart says the range lights are missing and this chart says they aren't.

MR. DE ORCHIS: I offer the Coast Guard chart, the official chart of the Coast Guard as Exhibit 1 and I will offer the exhibit at the captain's deposition as Plaintiff's Exhibit 2.

Do you have any objection to that?

MR. MALOOF: You offer both?

MR. DE ORCHIS: Yes.

MR. MALOOF: With the stipulation that the small one says the range lights are missing?

MR. DE ORCHIS: That is right.

Q What reputation did the C-2 freighters have --

MR. MALOOF: Objection. He didn't put this man down as an expert in the pre-trial order nor has he been sufficiently qualified.

MR DE ORCHIS: I qualified him as spending his entire life in the marine business and a captain of all oceans.

THE COURT: You can testify.

Q At the port of Rio Haina is there a prevailing wind?

qjw Mello - direct 27

A Yes, sir, in that area it's prevailing between east, east northeast and changed to the southeast but predominantly from the east.

Q How about the seas, are there prevailing seas?

A Yes, sir, south easterly.

Q When did it first come to your attention that the BEAUREGARD had had some difficulties at Rio Hiana?

A I was called by Mr. Collie on the evening of May 5th.

Q Who is Mr. Collie?

A Mr. Collie was our manager in the Dominican

qjw Mello - direct 28

Republic.

THE COURT: You were his immediate superior?

THE WITNESS: Yes, sir. That is as far as marine operations is concerned.

Q Who did Mr. Collie report to in case a ship got in trouble, who would be the person he reported to?

A He would call San Juan and we would relay whatever information was necessary to Elizabeth.

Q What is Elizabeth?

A That is our home port for Sealand.

Q Headquarters of Sealand is in Elizabeth?

A Yes, sir.

THE COURT: Where is that?

THE WITNESS: New Jersey, sir.

Q Had you known Mr. Collie before this incident occurred?

A Yes, sir.

Q You knew him personally?

A Yes, sir.

Q Can you tell us is Mr. Collie alive today?

A No, sir, Mr. Collie died about two years ago, I think.

Q Would you tell us what the conversation was with Mr. Collie?

A The conversation was that Mr. Collie called me and told me that the BEAUREGARD was aground at the entrance of Hiana, that he didn't know the details and could not get in touch with the ship, that immediately he would call me back and tell me what happened.

Q What did you do next if anything?

A The next thing I did, I alerted Elizabeth, our headquarters, got in touch with Mr. Griffin and told him to stand by and alerted the tugboat company in San Juan that we may have an emergency in the Dominican Republic and get the equipment ready.

THE COURT: How far is San Juan?

THE WITNESS: Approximately 235 miles.

THE COURT: Which is how long in time for a tugboat?

THE WITNESS: At 15 knots it would be about 17 hours.

qjw Mello - direct 31

Q The tugboat company that you alerted in Puerto Rico, is that an individual salvage company?

A It's an independent tugboat company, per se not salvage.

Q They were not Sealand's personal tug?

A No, sir.

Q This man Griffin you alerted in Elizabeth, who is he?

A Mr. Griffin was in San Juan. Mr. Griffin was the oeprations manager in San Juan, vessel operations.

Q After alerting Mr. Griffin and the tugboat company -- incidentally, when you say alerted the tugboat company, what was the deal with them?

A I requested Mr. Martin, who is president of Puerto Rico Lighterage to call his crews for the following day in case we had to send tugboats to the Dominican Republic.

Q At that moment you didn't actually order them out?

A No, sir, just alerted.

Q What did you do next?

A I waited for the phone call from Mr. Collie.

Q Was there another phone call from Mr. Collie?

A No, sir. The phone call was from Mr. Griffin.

qjw Mello - direct 32

Mr. Collie called Mr. Griffin and told him that the vessel was hard aground.

Q That the vessel was aground. What did you do then?

A Immediately I told him that I would proceed to the Dominican Republic.

Q Let me ask you, the first phone call he said the vessel was aground?

A Yes, sir.

Q What did the second phone call add if anything? You say the second phone call it was hard aground.

A Yes, sir.

Q Is that any different from the first?

A I guess he considered it hard aground that he was unable to remove it after the attempt was made with the tugboat.

Q What did you do next?

A I made arrangements to proceed to the Dominican

Republic.

Q How did you get there?

A I flew the following morning, sir.

Q What time did you arrive at Rio Hiana?

A I arrived at Rio Hiana around 10:00 o'clock maybe, 10:30 in the morning.

Q Would you tell us what the situation was with the vessel when you arrived at Rio Hiana the following morning?

A The vessel was aground on the west side of the break water close to a wreck.

Q I show you Plaintiff's Exhibit 1-A and ask you whether you can show us on this chart where the vessel was when you arrived at Rio Hiana?

A It appears that that was the position where the vessel was.

Q You are indicating the sketchmark B?

A Yes, sir.

Q And this wreck that you referred to, is that indicated on this chart?

A It's hard to say there.

Q Where those two things are?

A Yes.

MR. MALOOF: Perhaps the witness should make a mark.

MR. DE ORCHIS: He said the one marked B.

THE COURT: What is A?

MR. MALOOF: Maybe he can initial it.

THE COURT: B is the ship, what is A?

MR. DE ORCHIS: This is the ship location marked B, that is the way she lay when you saw her?

THE WITNESS: Yes, sir.

Q There is a heading there, was that the approximate heading?

A 015, yes.

Q Did you see the wreck that was lying just outside the break water?

A Yes, sir, I looked at the ship from the break water and I could see the wreck.

THE COURT: We haven't heard what A is.

MR. DE ORCHIS: A is where the ship first grounded and B is where she was when he arrived the next day.

THE COURT: I see.

Q Captain, I show you a photograph and ask you whether you can recognize that scene?

A Yes, sir, this is part of the wreck.

Q Does that photograph fairly depict what you saw with your own eyes?

A Yes, sir.

THE COURT: That is not your ship?

THE WITNESS: No, sir.

THE COURT: You better mark for identification the ones you are going to show him.

(Plaintiff's Exhibit 2 marked for identification)

(Plaintiff's Exhibit 2-A through 2-E marked for identification)

Q Captain, the first one you already looked at which is marked 2-A for identification.

Would you look at 2-B for identification and tell us whether you can recognize that scene?

A Yes, sir, this is also the wreck on the west break water.

Q What is that on the left side of the photo?

A That appears to be the crane of the vessel.

Q The crane of the vessel. And the vessel is

the BEAUREGARD?

A Yes, sir.

THE COURT: What of the vessel?

THE WITNESS: It appears to be the crane.

THE COURT: Crane is what you say?

MR. MALOOF: Yes, they have cranes to move the containers around.

THE WITNESS: It looks like it. Maybe my eyes fail me.

Q I show you Plaintiff's Exhibit 2-C for identification and ask you if you can idenitfy that scene?

A Yes, sir. This is the BEAUREGARD and the wreck.

Q I show you Plaintiff's Exhibit 2-D and ask you if you can identify that scene?

A Yes, sir, that is the bow of the BEAUREGARD and you can see the wreck on the right.

Q I show you Plaintiff's Exhibit 2-E for identification and ask you if you can identify that scene?

A Yes, sir. These are the tugboats, Puerto Rico lighters that are trying to pull the ship out.

THE COURT: What day was that operation?

THE WITNESS: That must have been the 6th, 7th or 8th.

Q After you arrived there?

A Yes, sir.

Q Captain, do all of these photographs fairly depict what you saw with your own eyes when you were down there?

A Yes, sir, I do.

Q You told us the BEAUREGARD was lying on location marked B on Plaintiff's Exhibit 1-A.

Would you tell us what part of the BEAUREGARD was aground when she was at that location? When you arrived what part of the ship that was aground?

A The part aground was from No. 1 hatch, to the best of my recollection, back to No. 6 or 7 hatch.

Q Did the BEAUREGARD have any cargo on board?

A Yes, sir, she was fully loaded.

Q Was the cargo on the ship containerized cargo?

A Yes, sir, the BEAUREGARD carried containerized cargo.

Q Did she carry containers below deck as well as on deck?

A Yes, sir.

Q At the time that she lay in that position grounded she had containers on deck?

A Yes, sir, she did.

Q How long is the BEAUREGARD?

A She must be 486 feet.

Q Captain, how many tiers of containers can the BEAUREGARD carry on deck?

A Two and one.

THE COURT: Two aft?

THE WITNESS: Four in the bridge but in No. 1 hatch we only had one.

Q Do you recall at this time how many containers she had on deck?

A How many containers we had on deck -- no, sir.

Q It's eight years ago. Are we talking of three, four containers or large numbers?

A We are talking large numbers, seven hatches which they all had containers on deck.

Q How many containers can the ship carry all

qjw Mello - direct 40

together?

A The ship all together carried to the best of my recollection 223 containers.

Q The breakwater that the BEAUREGARD was grounded near, the breakwater shown in this chart, can you describe to us what that breakwater looked like, what it was made of?

A That breakwater was made out of concrete blocks.

Q What do you mean by concrete blocks?

A Concrete blocks measuring I would say six by four by six.

In other words, good size concrete blocks.

THE COURT: Six feet?

THE WITNESS: Yes, sir. I can't tell you the exact dimensions but they were big blocks.

Q Big cubes?

A Yes, sir.

Q Not flat but slabs?

A I guess you could have some slabs, yes, sir.

Q Were these concrete blocks on the outside of the breakwater where the ship was grounded?

A Yes, sir.

Q How were they placed there?

A Most erratic. They were not uniform. I don't know how they got there but there were quite a few around.

Q They weren't put there in brick fashion?

A No, sir.

Q Just dumped?

A Yes, sir.

Q About how high was the breakwater roughly?

A I would be just guessing, ten feet maybe.

Q Above the water?

A Yes, sir.

Q Did you go aboard the ship?

A Yes, sir, I did.

Q Did anyone accompany you when you went aboard the ship?

A I think that Mr. Pierce, our port engineer arrived with me but I can't vouch for that.

Q Did you talk to anybody aboard the ship?

A Yes, sir, I talked to Captain Boehm.

Q Did you look at the log books?

A Yes, sir.

Q Who was CAptain Boehm?

A Captain Boehm was the master of the BEAUREGARD.

Q I show you what was previously identified as Defendants' Exhibit 16 at Captain Boehm's deposition,

March 6, 1974, and ask you whether you can identify this exhibit?

A Yes, sir, this is the bridge deck log of the BEAUREGARD.

MR. DE ORCHIS: I offer it in evidence.

MR. MALOOF: No objection. That is identified by Captain Boehm?

What did the captain say to you in the way of any report when you went on board the vessel?

A I asked the captain what caused the vessel to go aground. The captain's statement was that as they were proceeding in the wind and current was stronger --

A Captain Boehm's contention was that the wind and current were above normal and the vessel took a sheer and when he ordered right rudder the vessel didn't answer.

Q Did the captain say whether or not a pilot had been on board at the time?

A Yes, sir, he had a pilot on board.

Q Did he say where the ship had grounded in relation to the breakwater?

A Not in detail, no, sir.

Q Did he indicate whether the place where the ship was grounded was the same place or the same position as you now saw the ship on the 6th?

A No, sir, it was not in the same position. It had moved since then.

Q When you say it had moved --

THE COURT: What is the purpose of all this? We are going to get it from the captain's deposition anyway.

Q Did you investigate or did you make any investigation of the situation that the ship was in at the time?

A Yes, sir. When I arrived I had ordered a team of divers from Puerto Rico and also requested the assistance of divers from the Dominican Navy to make a complete survey of the ship's surroundings to see which way we were going to get her out.

Q Did the divers go down and take a look at the bottom?

A Yes, sir, they did go down.

Q What did they report to you?

A They reported the area where the ship was grounded and they made a sketch of the adjacent areas.

Q What did you learn about the nature of the ground underneath the BEAUREGARD?

A That she was hard aground on the port side from No. 1 hatch all the way back to No. 6.

Q And did they report anything about whether you had mud, sand, rocks?

A There were slabs. She was resting on some slabs of concrete and there was sand and also mud on the other side.

Q What was the weather when you arrived? What was the weather like on the 6th, the morning of the 6th?

A I think the wind was easterly or southeasterly but it had calmed down considerably from the day before.

Q Were there any swells in the area ?

A Yes, sir, there were swells, three, four, maybe five feet.

Q In your opinion, was the ship in a position of peril at the time?

MR. MALOOF: Objection.

THE COURT: He ought to be able to express an opinion on that.

A My opinion is that any vessel that is aground in that bottom is in peril at all times.

Q Why is that?

A Because if sea conditions or wind or weather deteriorates there is a possibility she may break or puncture her hull.

Q At the time when you investigated, when you first arrived, was there any evidence, any indication that

qjw Mello - direct 46

the ship was holed anywhere, taking water anywhere?

A No, sir, we had soundings taken regularly, every so many hours, soundings were taken on all the bilges and the ship was tight at all times.

Q Was there any danger of the ship climbing up further on the beach, going further aground?

A No, sir. We made sure that the ship was not deballast. As a matter of fact, I am not sure but I think we added ballast during thenight to prevent the ship, in case the weather deteriorated, from going further on the beach.

Q You say you added ballast. What do you mean by that?

A Put saltwater in tanks for that purpose.

Q To make her heavier?

A Yes, sir.

Q What effect would that have, making her heavier?

A The ship would not have a tendency to drift toward the shore.

Q In order to get her off this position would you have to lighten the ship?

A Yes, sir.

Q So this step --

qjw Mello - direct 47

MR. MALOOF: These are leading questions. This is his own marine superintendent. Can we get Mr. Mello's story?

THE WITNESS: They are rather technical questions. Overruled.

Q This putting of ballast into the ship as a first step was to see she didn't move?

A Yes, sir.

Q Did there come a time when you formulated a plan of action as to how you would save the ship?

A Yes, sir, once the tugboats arrived and we secured lines to the tugboats and prevented the ship from further moving we started taking the ballast out of the ship.

By taking the ballast out we would lighten her and try to move her away with the tugboats.

Q In arriving at this plan of taking the ballast out to lighten her, did you have any alternative plans that you considered?

A Well, if this failed the only other thing that we could have done was taken the cargo off the ship.

Q Would it have been possible to jettison the containers on deck?

A Yes, sir.

qjw Mello - direct 49

have done it but they refused because it was too dangerous.

Q The only way to lighten the ship by getting rid of cargo would have been to jettison the containers?

A Yes, sir.

Q Did you jettison any containers?

A No, sir.

Q Did you throw any cargo overboard as distinguished from containers?

A No, sir, no cargo whatsoever.

Q Tell us now how you carried out the plan that you formulated, that is that you were going to do this by lightening her, deballasting?

A As I recall, after we had the survey made of the bottom and we started lightening the ship and the tugboats were constantly pushing we were also using the engines.

As I recall I guess it was on the 8th of May we felt the vessel start moving in an up and down motion and the bow started moving back and forth and that is when she started breaking up the hole she had.

We started maneuvering her from I would say 6:00 o'clock until 8:00 or 9:00 o'clock when she was totally afloat and free.

During the process we ran aground three or

qjw Mello - direct 48

Q How would you have done that?

A We would have taken the containers and dropped them into the sea.

Q On which side of the ship?

A On either side of the ship.

Q Did the ship have cranes which could load and discharge containers?

A Yes, sir, it has two cranes, one forward and one aft.

Q So the ship can load and discharge its containers?

A Self-sustaining, yes, sir.

Q Would it have been possible rather than jettison the containers, that is throw them overboard, would it have been possible to discharge them?

A We had an alternate plan where we would bring a barge from San Juan and we were trying to find a tugboat with shallow enough draft so he could come alongside the port side and we would have tried to discharge the vessel in that fashion.

Q Did you find a tugboat with a shallow enough draft?

A We could not find the tugboats and the ones that were, I think one of the Dominican Navy's could

qjw Mello - direct 50

four different time due to the different contours of the bottom. It was not a level bottom and as we were walking her out we would ground, walk her over on the other side, move the cranes fore and aft to change the trim and that was a tedious process.

Q What do you mean by walking her out?

A We were trying to get her out of step by step, shall we say.

Q How did you do that? How did you manage to change her trim step by step?

A We change the trim by moving the cranes forward and aft.

Q These cranes are on deck?

A Yes, sir, they are on deck and they run on rails back and forth.

Q The entire length of the ship?

A Yes, sir.

Q When you move the cranes way up forward the weight of the cranes is up forward?

A The weight of the crane lowers the bow and raises the stern or vice versa.

Q Can you also use the cranes to shift weight from port to starboard?

A Yes, sir, by raising up the arms.

ajw Mello - direct 51

Q Was that done in this case?

A Yes, sir.

Q As you shifted the weight of the cranes did the ship change her trim?

A Yes, sir.

Q The deballasting, was any ballasting and deballasting done?

A We deballast everything. We took all the ballast we wanted to take out and after we had the vessel in deep water we reballast the ship, yes, sir.

Q Was this a risky operation, the plan that you made?

A Yes, sir, it was.

Q Why was it risky?

A It was risky because if we had holed the ship and the engine room we maybe would have lost the ship, a total loss.

Q If you had thrown the cargo overboard would not that have provided less risk for the ship?

MR. MALOOF: I think Mr. DeOrchis has abused your privilege of leading questions. This is a bit much.

THE COURT: Would it or would not it have?

THE WITNESS: I think we would have had

qjw Mello - direct 52

a greater loss if we had thrown the cargo to the side, your Honor.

THE COURT: What do you mean?

THE WITNESS: We would have damaged the ship and also the cargo and the containers.

THE COURT: The question is, would the throwing of the cargo off made it less likely to damage the ship or more likely to damage the ship?

THE WITNESS: I would say the same thing.

THE COURT: All right.

Q You mentioned that the loss would have been greater if the cargo had been jettisoned. Is that the overall loss of the cost of saving her?

A I would say, sir, if we had thrown the cargo over the side instead of taking the ballast off the ship you would still have the same danger to the vessel plus the cost of your cargo and containers.

Q So your plan minimized the loss?

A Yes, sir.

Q But the loss fell on the ship?

A Yes, sir.

Q Would you tell us now what was the loss that the ship suffered as a result of the plan that was used to save her and the cargo?

Q What was the damage that she suffered?

THE COURT: Do you know what the bottom damage was?

THE WITNESS: Yes, sir.

Q What was the damage?

A I could not giveyou a detailed plate by plate analysis of what the bottom was but I made a trip --

THE COURT: Haven't we got a stipulation as to what the damage was?

MR. DE ORCHIS: We will have the surveyors here who have reports plate by plate.

THE COURT: Why do we need him then?

MR. DE ORCHIS: I am trying to establish that the damage to the bottom was caused by the grounding.

Q Was the damage to the bottom caused by the grounding?

MR. MALOOF: Objection. I don't think he knows whether the ship came into port damaged or not.

THE COURT: Do you know whether the ship was damaged when it came to Rio?

THE WITNESS: I can testify that that ship was not damaged prior to going into Rio Hiana and that the damage was sustained during the grounding.

THE COURT: How do you know that?

THE WITNESS: I made a special trip to the United States to look at the ship when she was in drydock, sir.

THE COURT: How did you know what the condition was before?

THE WITNESS: That ship was drydocked and surveys conducted and there were no groundings whatsoever with that ship since she left drydock.

Q When you saw the bottom in the drydock was the type of damage you observed to the bottom consistent with the type of damage those blocks would have caused if the bottom would have been the cause?

A I would say the bottom looked like a washboard.

THE COURT: That is not the answer to the question.

A Yes.

Q When you observed the bottom at New York the type of damage you saw, was that the type of damage

that you would say was caused by the grounding?

A It could have been, yes, sir.

Q That wasn't anything different that would have been caused by a collision with another ship?

A No, sir.

Q When the divers went down at Rio Hiana before you started your operation did the divers check the bottom of the ship?

A Actually they could not see the condition.

Q Because she was grounded?

A That is right.

MR. MALOOF: I object to any testimony by Mr. Mello on what the divers could see.

Q Who were the divers reporting to as they came up out of the water?

A They came up and reported to me.

THE COURT: Was there any question that this damage was caused by the grounding?

MR. DE ORCHIS: None at all. We have subpoenaed the American Bureau of Shipping which has a record --

THE COURT: Then let's not waste time on this.

Q During this operation, Captain, of trying to

pull the ship off the rock what tugboats did you use?

A I used four tugboats from Puerto Rico Lighterage and also there were two tugboats as I recall from the Dominican Navy that were assisting.

Q Other than tugboats did any other type of vessels help?

A We requested service of a Dominican Navy frigate.

Q You say on the 8th, but can you tell us from the log book the time she grounded and the time that she came off?

THE COURT: Can't we move along a little faster?

MR. MALOOF: I would hope so, your Honor.

A She grounded on May 5th.

Q At what time?

THE COURT: Don't you know? Isn't that stipulated? Why waste the witness' time on stipulated facts.

MR. DE ORCHIS: I am looking at the stipulation. I thought it had been stipulated.

A 8:13, sir.

MR. DE ORCHIS: 1813, your Honor.

THE COURT: Paragraph 4 of the stipulation

in the pre-trial order. Why waste time on that kind of stuff?

Q During the period of time that you were using tugs to pull the vessel off the strand, did any lines break?

A Yes, sir.

Q Can you tell us about that?

A We had the insurance cable taken off that was stowed in the stern and we were passing it over to the frigate, the Dominican Republic, to help us pull.

Q What is an insurance cable?

A It's a big heavy cable that is used for a specific purpose of salvage or vessel stranding or as an aid to the ship.

Q Is that bigger than the ordinary tug hawser?

A Yes, sir, it is normally a 2-1/2 or 2-3/4 inch steel cable.

THE COURT: Was that on the ship?

THE WITNESS: Yes,sir, it is on the ship. All ships carry it.

Q Other than this big insurance cable did any other lines part?

A We had other lines part. I can't give you the details but I know we had lines parted.

Q Captain, you have been involved in other salvage operations during your experience, have you not?

A Yes, sir.

Q Is it foreseeable that lines will part when tugboats are towing on a stranded ship?

A Yes, sir.

MR. MALOOF: Objection. He has not been qualified as an expert and his name is not in the pre-trial order as an expert. That is an expert question.

MR. DE ORCHIS: I am asking the man as a seaman whether it is foreseeable or not.

MR. MALOOF: He is here as a fact witness.

MR. DE ORCHIS: I have qualified him as an expert also.

THE COURT: I will allow the question. It seems to me obvious the thing will break sometimes.

THE WITNESS: Yes, sir.

Q It is foreseeable?

A Yes, sir.

Q When the ship was taken off the starnd what happened next? After she was floated what happened next after that?

A After we took her off we took soundings again to make sure she was water-tight and started

qjw Mello - direct 59

replacing the ballast we had taken off the ship.

Q What did you find with regard to water-tightness?

A There were no leaks whatsoever on the hull of the ship. She was tight.

Q And then what happened?

A Then we waited until daybreak and brought her alongside the dock.

Q Inside the harbor?

A Yes, sir, and docked her.

Q When did you leave Rio Hiana?

A I left Rio Hiana on May 8th after the vessel was safely alongside.

Q In the harbor?

A Yes, sir.

Q When was the next time you saw the ship?

A The next time I saw the ship was when she was in drydock in Todd's Shipyard in Hoboken.

Q Is that the time you observed the bottom of the ship?

A Yes, sir.

Q Captain, going back to these tugboats, you mentioned Dominican Navy tugboats and a frigate.

A Yes, sir.

qjw Mello - direct 60

Q Were those like Coast Guard? Were they volunteering services?

A No, you request the service. They don't volunteer.

Q They have to be paid?

A Yes, sir.

Q And the local tugboats when they are used do they have to be paid?

A You mean the local tugboats?

Q If you take the local tugboat in Rio Hiana and wanted to pull you off a strand do they have to be paid?

A Yes, sir.

Q And the people you brought from Puerto Rico, I assume they have to be paid?

A Yes, sir.

THE COURT: I thought the amount of damage was stipulated.

MR. DE ORCHIS: I don't know whether they are going to question that any of these people should not have billed us.

THE COURT: I thought there was a survey reporting that.

MR. MALOOF: We made no such agreement.

qjw Mello - direct 61

THE COURT: I thought there was a general average survey.

MR. MALOOF: We have agreed that the amounts have been paid in this case. The amounts have been paid to repairmen and all of these general average expenses.

We do not agree anything is prior general average.

THE COURT: But we are not quibbling on details, are we?

MR. MALOOF: No, we are not.

qb- Mello-direct 62

Q Captain, when you observed the ship in the drydock in New York and examined her bottom, were you able to tell from the damage what part of the ship had been damaged when she went ashore with her bow?

A No, sir.

Q After the ship was released from the rocks that was on May 8, 1967, was it not?

A Yes,sir, that is right.

Q What time of the day, would you remember?

A It was whenshe was completely afloat, I think eight o'clock.

Q At night?

A Yes,sir.

Q Did she come in to Rio Haina right away?

A No, sir.

Q What did she do?

qb Mello-cross 76

A We steamed outside until daybreak.

Q May I inquire why you didn't come into Rio Haina at that time?

A We didn't have a pilot and No. 2, we wanted to ballast before coming in.

Q How long does it take to ballast?

A Five, six hours, I don't know.

Q After ballasting was completed you still didn't come in?

A No, sir.

Q When did you come in?

A Five, six o'clock inthe morning.

Q When it was light?

A Yes, sir.

Q You testified that there were prevailing winds at Rio Haina from east to west.

I show you Plaintiff's Exhibit 1A and I would request you to make an arrow near the entrance which would demonstrate how those winds would come.

A If this is north it would be almost abeam.

Q Would you put an arrow in it.

A What do you want, east?

Q Just make an arrow the way the wind comes.

A Yes.

qb Mello-cross 78

Q You said the prevailing seas were I belive south-easterly?

A Yes, sir.

Q Make an arrow for that and write "seas" and initial that.

A Right.

Q Thank you.

From the lines that you have just made it would seem that both the wind and the seas would have an effect on a ship coming into Rio Haina and would tend to force that ship to port to her left?

A That is correct, sir.

Q This is well-known to everybody, isn't it?

A Yes, sir.

Q After she stranded by the bow would you say she was in the position of peril?

A Sir, I made a statement before that any time a vessel is grounded she is in the state of peril.

Q So that really something had to be done, right?

qb Mello-cross 79

A Yes, sir.

Q It would be considered an urgent situation?

A Yes, sir.

Q The captain testified that he feared the wind and the sea would force the Beauregard stern to port and she would then strand in a worse position, practically abeam of the wrecked tanker.

Do you remember him telling you that?

A No.

MR. DE ORCHIS: I would prefer he directly quote the captain from the deposition. The captain said she would break up, is what he feared, she would swing over and break up.

Q I show you a document which is dated October 6, 1969.

MR. DE ORCHIS: I take it the question is withdrawn now? That is not his testimony.

MR. MALOOF: Is that an objection?

THE COURT: The question is withdrawn?

MR. MALOOF: No, sir.

Q I want you to identify this document.

A It is a signed statement by Captain Boehm.

MR. MALOOF: Identification.

(Defendant's Exhibit B was marked for identification.)

Q Captain, on page 32 of Captain Boehm's deposition he was asked these questions and he gave these answers:

"Q Do you remember then was the ship in the position of peril?

"A Oh, yes.

"Q What did you fear?

"A Well, I feared that the wind and swell would increase and drive her further ashore."

That was a peril to be concerned with, wasn't it?

A Yes, sir.

Q And so the captain took advantage of the one tug which was in Rio Haina and brought it around to the starboard quarter and threw that tug a hawser, didn't he?

A Yes, sir.

Q You weren't there but the captain told you all this?

A That is right.

Q And in that way he hoped to prevent the ship from being driven -- the stern of the ship from being driven to port?

A Yes, sir.

Q And also of course to get the ship off the rock, if possible?

A Yes, sir.

Q When that ship broke, the stern went to port, didn't it?

A Evidently. I wasn't there.

Q But you saw it off, you got there, and you were told by the captain what the previous position had been, so can't you say she went to her port?

A She must have because there are two positions on the chart.

Q Right. So that what happened was precisely what would have happened if nothing had been done, can we say that?

MR. DE ORCHIS: Objection.

THE COURT: Not what would have happened, what

the captain feared would have happened.

MR. MALOOF: Yes, sir, from what he could see.

MR. DE ORCHIS: Mr. Maloof read to the captain one sentence in which the captain answered he feared it would go ashore, but he didn't read him the next two sentences in which the captain explained what he meant by going ashore, which was that he would end up on the top of the

tanker and break up which is far worse than moving on the ground. That is what the captain feared.

THE COURT: It seems to me you are stretching this case. I don't follow the objection.

You can answer the question.

(Question read.)

A I can't agree with that. I say that if the line hadn't broken the ship would have been floating.

THE COURT: If they hadn't put the tugboat there at all. The ship is aground, the question he is asking, supposing no tugboat had been attached at all and the ship would be left there, what would have happened?

THE WITNESS: I don't know. It is hard to answer that. It could have been worse, it could have been better.

Q There is no mathematical formula on the way a ship is driven by the wind, is there?

A Right.

Q We are talking about the general direction. Can't you agree with my question?

A I can't agree that if nothing would have been done you would have been in the same position, no, sir, I can't.

Q Let me ask you this: What made that ship, the

qb Mello-cross 83

stern of the ship go to port?

A When you are pulling the way the tug was pulling and she was aground, there are certain forces and when you release that force you will have a tendency to go the opposite way.

Q Are you saying the tug which was there caused the ship to go to the second position? Is that what you are saying?

A The tugboat?

Q Yes, when the line broke the whole salvage effort, was that the cause of the second position of the ship?

A I would say that the wind and weather and the tug would all have a part in it.

MR. MALOOF: I am building up to another question, your Honor.

Q On your deposition were you asked this question and did you give this answer on page 50, pages 49 and 50, or just 50.

"Q Assuming that the drawing I have just referred

qb Mello-cross 85

you to was prepared to show how the Beauregard moved between the time of its initial stranding and the time the line parted what would account for the ship moving both with respect to its heading and with respect to the position

between the time of the initial stranding and the time the line parted, do you understand my question, captain?

"A Yes, sir, your question is what caused it to move from Position A to Position B, let's say.

"Q Yes.

"A Most likely wind and weather, I would say."

You answered that.

THE COURT: Whose deposition is that?

MR. MALOOF: Captain Mello's deposition udner oath in 1974. You testified that way, didn't you?

THE WITNESS: That is correct.

Q This is true, isn't it?

A That is true.

Q On page 53 --

A Can I clear up a point with you with reference to that question? You asked me when the tugboat line parted in that question. When the tugboat line parted she remained in Position A. My statement was in Puerto Rico what caused it to move from Position A to Position B. The question that you asked me is if the line parted which

should have been in Position A, what was her position before, for a matter of record.

Q I don't know if I understand you.

When the line broke the ship didn't move, is that right, but then the wind and weather acted upon it?

When the line broke for whatever reason the ship remained in Position A. My question was what caused the ship to move to Position B.

What is your answer?

A Wind and weather.

THE COURT: The question is -- here is the ship with its bow in this Position A. We all know that in fact a tug was attached and the line broke and we know what happened. The question is what in your judgment would have happened if they just hadn't attached a tug at all, just left it the way it was, what in your judgment would have happened or do you have an opinion on the subject?

THE WITNESS: She would have moved too, but I don't know if she would have been in the same position as B or maybe in a more perilous position when she was almost touching the breakwater.

THE COURT: I want to be sure I understand you. In other words, if they never attached that tug at all, decided to do nothing, she might have been worse off than

in fact she was, is that your opinion?

THE WITNESS: Exactly right, sir.

Q On page 37 you were asked this question and you gave this answer --

THE COURT: I think you got that answer.

MR. MALOOF: I withdraw the question, your Honor.

Q When you spoke with Captain Boehm, Captain Mello you asked him what happened, of course, is that true?

A Yes, sir.

Q Captain Boehm did tell you that they ordered hard right rudder and there was no response from the ship,

you remember that?

A He said that the vessel didn't answer, yes, sir.

Q Could you account for that failure to respond?

A It could have been adverse current, less headway.

Q Could wind cause such a thing?

A Currents to a certain degree, yes, sir.

Q Are wind and currents completely strange things at sea?

A Sir?

Q Are they unusual things at sea, wind and current?

A In certain instances, yes, sir, they are unusual.

Q Captain, in a salvage operation like this using tugs and hawsers, it isn't common for a rope to break, is it?

A Is it common?

Q Yes.

A It is not common. I say it happens. It is not usual but it happens at times, yes.

THE COURT: It is a foreseeable risk but not a usual occurrence?

THE WITNESS: That is right.

Q You testified that an insurance wire was broken?

A Yes, sir.

Q When the ship was in the second position, right?

A When the ship was in the position when I saw it.

Q That is when she was stranded practically over

qb Mello-cross 94

her whole length, right?

A Well, actually she was always afloat, bow and stern.

Q But she was stranded from hatch 1 to hatch 7?

A The stern was afloat at all times. It is in the testimony.

Q Thank you, sir.

When the ship was on the first strand you testified that that was a matter of urgency, didn't you? She was in peril.

A Yes, sir.

Q Because part of her body was stuck. I suppose because it was considered a matter of urgency, they didn't wait for other tugs to come and help?

A That is correct, sir.

Q So they just went ahead with the one small tug?

A That is right.

qb Mello-cross 96

THE COURT: This may sound like a foolish question but would it have been possible just to put a tug on there and not try to get her off with the tug, but try to use the tug to hold her steady against the wind?

THE WITNESS: After that line parted --

THE COURT: Before the line parted. Instead of trying to use enough force to get her off and thereby increasing the risk in parting the line, couldn't they have just attached the tug as a kind of holding operation

against the wind?

THE WITNESS: I would venture to say, sir, as master of the vessel I would have done exactly the same thing Captain Boehm did. The first thing is try to free the ship and get her out.

THE COURT: In other words, my question is foolish?

THE WITNESS: No, but under the circumstances the captain tried to get the ship out with the available means he had at his disposition.

Q The primary motive was to get the ship off the rocks?

A Yes, sir.

Q I think you said that you went aboard the ship with the port engineer?

Q When you arrived yousaid there were swells in the sea, ocean swells.

A Yes,sir.

Q About how high were they?

A Three to five feet, maybe.

Q Captain, was there any damage caused to this ship's bottom from any movement to starboard?

A Sir, if there was any damage we moved the ship port and starboard. I can't even try to give you a sketch of what we did getting that ship out.

Q You said something about walking her out.

A We went port and starboard. We went all over that place. For me to try to give you a step-by-step description of what I did eight years ago, I can't do it.

Q But if the ship went port and starboard wouldn't there be roughly -- wouldn't there be damage both port and starboard?

A Whatever damage was revealed when the vessel drydocked, in the best judgment that I have, that damage was done when the vessel grounded in Haina and tried to take her out.

THE COURT: What part of the damage came from

the grounding and taking out, you are in no position to say?

THE WITNESS: Right.

THE COURT: Should an expert in salvage have been employed for this job instead of you?

THE WITNESS: They had an expert in salvage arrive there and he arrived a little late.

Q Did you seriously consider jettisoning containers from this ship?

A Yes, sir.

THE COURT: What would have been the purpose of jettisoning the containers?

THE WITNESS: To lighten the ship up more.

MR. MALOOF: I offer Captain Boehm's statement of October 6, 1969.

MR. DE ORCHIS: No objection.

(Defendants' Exhibit B was received in evidence.)

THE COURT: You have a genius for not leaving well enough alone.

MR. MALOOF: Everyone has his disabilities.

Q Captain, for what company do you work now?

A Puerto Rico Marine Management, sir.

Q Does that company have a connection with Sealand Services?

A No, sir.

MR. MALOOF: No further questions.

THE COURT: On your direct examination, as I understood you to say, jettisoning the cargo, it wouldn't help getting the ship off, just hurt the cargo.

THE WITNESS: If we took 500 tons of ballast or took 500 tons of cargo, it was cheaper to take the 500 tons of ballast and not the cargo, jettison the cargo, because the damage to the ship would have been there the same way. That way you would have damaged the containers and the cargo.

THE COURT: You did take the 500 tons of ballast?

THE WITNESS: Yes, sir.

THE COURT: And that was enough?

THE WITNESS: If we hadn't been able to take her out after that the next step would be to jettison the cargo.

THE COURT: When you say you seriously considered jettisoning the cargo, you considered that as the next step, but you never considered actually doing it until it became necessary?

THE WITNESS: Until the last resort, yes, sir.

REDIRECT EXAMINATION BY MR. DE ORCHIS:

Q As another last resort you had a professional

qb Mello-redirect 101

salvage tug on its way?

A Yes,sir.

Q If you had to use the salvage tug would the cost, the overall cost of this saving attempt, would that have been much higher?

A Yes,sir.

Q Did anybody claim salvage against this cargo, salvage claims?

A No, sir.

Q Were you given any reward for what you did?

A No,sir. I take that back,sir, I got a dozen golf balls.

Q Did you claim any salvage against the cargo or the ship?

A No,sir.

Q YOu were doing this as part of your job?

A Yes,sir.

Q Based on what you know about the case, when that ship first went into the breakwater to her bow she went in at a certain degree, a certain -- she was pointing to a certain degree, right, in the log?

A Yes, sir.

Q Did she remain in that fixed position until the time that the tugboat line broke?

qb Mello-redirect 102

MR. MALOOF: Objection, your Honor, unless he is reading from the log.

He wasn't there at the time.

THE COURT: He is reading from the log.

A "Ship's head was 357 at 1833, attempting to pull the ship out the line parted."

The next heading of the vessel, I guess it is what in the diagram, is 0015.

Q After the line parted?

A Yes, sir.

Q Captain, Mr. Maloof read to you one question he put to the master of the vessel, but he didn't read to you the next question which is on page 32:

"Q What did you fear overall might happen if nothing were done?

"A Well, I feared that there was a wreck already there alongside the breakwater and --

"Q Is that the drawing of the ship broken in half on the Coast Guard map?

"A Yes, sir. I figured that the stern would swing right around and land right up there where it was and the ship would be broken up."

Captain, what, in your opinion, do you agree with

qb Mello-redirect 103

the master's fear that this ship could have swung around up against that wreck and be lost completely?

A Absolutely, sir.

Q That was a possible risk he was facing?

A Yes,sir.

Q You testified that one of the things you have to foresee or what is foreseeable is this business of lines breaking.

A Yes,sir.

Q In an overall salvage operation is it foreseeable that in any number of steps you might take that one of the most intermediate steps might put the ship in a worse position momentarily but eventually you save her?

A Yes, sir.

Q There is no guarantee that every step you take will save the ship, is there?

A That is correct, sir.

MR. DE ORCHIS: No further questions.

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MR. DE ORCHIS: If your Honor please, I would like to recall Captain Mello to the stand.

J U L I O M E L L O , resumed the stand, having been previously sworn, testified as follows:

REDIRECT EXAMINATION CONTINUED

BY MR. DE ORCHIS:

Q Captain Mello, you heard the colloquy between the Court and counsel here just before we broke for lunch?

A Yes, sir.

Q You heard Mr. Maloof state his position and you heard me state my position?

A Yes, sir.

Q This Rule 5 of the York-Antwerp Rules which Mr. Maloof referred to, before asking you a question I want to read you the rule.

"Rule 5, voluntary stranding, when a ship is intentionally run on shore and the circumstances are such that if that cost were not adopted she would inevitably drive on shore or on rocks, no loss or damage cost of the ship, cargo and freight or any of them by such intentional running on shore shall be made good as general average but loss or damage incurred in refloating such a ship shall be allowed as general average."

The first question I want to ask you to see whether the situation here fits the rule, was there anything that you heard or investigated in Rio Hiana which supported this first part of the rule that a ship was intentionally run ashore, was the BEAUREGARD intentionally run ashore?

A No, sir.

Q You know of no evidence that anyone intended to run the ship ashore?

A No, sir.

Q The second part of the rule, and the circumstances are such that if that course were not adopted she would inevitable drive on shore, as to that part

of the rule assume that after the BEAUREGARD ran ashore against the breakwater with her bow up against the tanker, if there had been no tugboat, no assistance whatsoever and the BEAUREGARD had just remained in that position, from all you know, do you have an opinion as to what possible things could happen?

Can you tell us if there had been no tugboat, no one had called the tugboat and she was just stuck there, what are the consequences?

MR. MALOOF: Objection to asking this witness that opinion. His opinion is that he wasn't even there.

THE COURT: He seems sufficiently expert to

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qjw 3 Mello - redirect

venture an opinion and its weight is for you to argue and for me to decide.

You may answer.

MR. MALOOF: Of course he isn't listed as an expert in the pre-trial order, your Honor.

THE COURT: I will take that into consideration too.

MR. DE ORCHIS: Mr. Maloof asked him the same question.

THE COURT: So did I so we all get a similar answer.

MR. DE ORCHIS: I will withdraw the question and ask you this:

As to the second part of the rule, do you have an opinion as to whether the BEAUREGARD after she ran aground at Position A would inevitably have driven aground or ashore at Fosition B?

A Not necessarily.

Q Why not?

A She could have been aground such where she would have remained there unless the weather deteriorated later on.

Q Did the weather deteriorate?

A To my knowledge, no, it did not deteriorate.

Q She could have remained there stuck?

A Yes, sir.

Q Are there any other things that could have happened if the weather had gone the other way?

A She would have deteriorated and maybe she would have broken up or we would lose the ship.

Q In what way would she have broken up?

A Having the bow and stern afloat she would have a tendency to rise up and break up.

Q Break her back?

A Yes, sir.

Q Is there any other thing that could have happened to her?

A She could have pulled the engine room and taken in water.

Q Is it your testimony that she would not

inevitably have gone to that Position B if the captain had chose to do nothing or if a tugboat had not been available?

A That is correct.

Q Let me ask you this last question, Captain: As a master mariner if you had been in that position and a tugboat was available what would you have done?

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A I would have taken the same action.

Q You would have called the tugboat?

A Yes, sir.

Q If you had called the tugboat would you have taken the risk that a line might part?

A Yes, sir.

Q Would you have been willing to take the risk that if the line parted temporarily you might be aground?

A Yes, sir.

MR. DE ORCHIS: No further questions.

BY MR. MALOOF:

Q Were you there on May 5th?

THE COURT: No, he was not. I know that.

Q Do you know what did cause the movement to port?

A Weather conditions, the line breaking, several things could have happened.

Q But the weather conditions were an element in that?

Q When you testified under oath in 1974 did you mention that the line breaking was a cause of the movement to port?

A No, sir, I was asked what would cause the vessel to move from Position A to Position B and I said wind and weather.

Q You didn't say anything about the line breaking --

THE COURT: You went into all of that.

MR. DE ORCHIS: I offer in evidence the general average statement of the BEAUREGARD.

MR. MALOOF: Objection, your Honor, unless we have a man who prepared it. It is just a document.

MR. DE ORCHIS: The man is in court.

THE COURT: Why do you want him for? Do you dispute this?

MR. MALOOF: It is full of statements and facts which of course we dispute. We don't dispute the numbers of the thing. It's offered in total.

MR. DE ORCHIS: I am offering it just for the numbers.

THE COURT: Accepted for the numbers and nothing else.

MR. MALOOF: Then we don't dispute it. We do disagree with the columns the numbers are put in. The

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general average adjuster has to make determinations as on whether certain expenditures are general average or not.

This particular one says that the damage caused on the rocks is a general average sacrifice. We don't agree with that. That puts it in the wrong column.

THE COURT: If I conclude that you are correct in your position, is it possible to figure out from that document what the result of that conclusion would be?

MR. MALOOF: I think so, mathematically.

THE COURT: Then the man who made that document can't shed any light on what my conclusions should be.

MR. MALOOF: He can shed a lot of light on how he arrived at his conclusion that it's general average.

THE COURT: You can mathematically state, as I understand it, that if I find that general average stops at Point X in the proceedings you can find out what happened after Point X and before Point X?

MR. MALOOF: Yes, but Mr. Myerson should be a witness in this case definitely.

THE COURT: I will accept the document and permit you to cross examine Mr. Myerson.

MR. MALOOF: Very good.

(Plaintiff's Exhibit 5 received in

Julio Mello - For Plaintiff - Redirect - 121

Howard Myerson - For ~~Defendant~~ PLAINTIFF - Direct - 121

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evidence)

THE COURT: You might as well do it now.

MR. DE ORCHIS: What Mr. Maloof was getting at, he wants to be in a position to cross examine this man. He is not my witness. I am having now to call him as my witness. I think he ought to be a Court's witness.

THE COURT: You are offering his product.

MR. DE ORCHIS: Only for numbers and they say they don't object to numbers.

THE COURT: It doesn't make any difference whose witness it is.

MR. DE ORCHIS: He is here and he is willing. Mr. Myerson.

H O W A R D L A W R E N C E M Y E R S O N ,

called as a witness, being first duly sworn, testified as follows:

THE COURT: Tell me generally what your job is.

THE WITNESS: I am a general average adjuster and when you have a general average situation which involves general average damage to a ship or cargo or freight or any of the other interests involved in a maritime adventure a professional must be employed to state what the amount of

damage is, who must contribute and what proportion he must contribute. I have no binding law.

THE COURT: How did you get to do this kind of work?

THE WITNESS: We have a profession in the United States, the Association of Average Adjusters of the United States. There are similar organizations in Canada, the United Kingdom and Europe.

In most cases in the United States it involves a five year apprenticeship and an examination.

THE COURT: You did that when?

THE WITNESS: I apprenticed in 1955. I passed my examinations in 1960 and I have practiced in the United States, Canada and England.

MR. MALOOF: I thought this was my cross examination?

THE COURT: Do you want him for anything? You put in the figures. Do you want him for anything else?

MR. DE ORCHIS: I put in the figures but since he is on the stand I want to ask him about this Rule 5.

THE COURT: Okay.

DIRECT EXAMINATION

BY MR. DE ORCHIS:

Q You heard the captain's testimony and you

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have heard the reference to Rule 5?

A Yes.

Q The York-Antwerp Rules?

A Yes, I have.

Q You know that rule?

A Yes, but may I please see the text?

Q The text we are going to show you is the text that you have to assume is in the York-Antwerp Rules that are adopted into the Bill of Lading.

As a matter of fact, why don't you do that for us.

Do you have a bill of lading of the BEAUREGARD?

A Yes, I do. This is a bill of lading on the voyage in question on which the general average occurred.

Q That is typical of the bills of lading that would have been issued for the ship?

A That is correct.

MR. DE ORCHIS: I offer in evidence as Plaintiff's Exhibit A and B the short form and long form bill of lading respectively.

(Plaintiff's Exhibits 6-A and 6-B received in evidence)

Q To save time, can you tell us did the bill of lading incorporate the York-Antwerp Rules?

A Yes, the York-Antwerp 1950 subject to the uses of the port of New York as stated in the preamble to the

general stated adjustment.

Q The York-Antwerp 1950 Rules,did they contain the Rule 5 that you have before you out of Mr. Maloof's brief?

A Yes.

Q Are you well acquainted with that rule?

A Yes.

Q You work with it every day?

A Yes.

Q Do you have a professional opinion as to whether that Rule 5 applies to the situation you heard described this morning where the ship ran aground at Rio Hiana?

MR. MALOOF: I object to that. He is taking the issue right out of your hands.

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qjw 14 Myerson - direct

MR. DE ORCHIS: It is the opinion of the expert.

THE COURT: He didn't take it out of my hands. He is expressing an opinion and if somebody expresses a contrary opinion I can decide.

A Will you rephrase the question, please?

Q The question is, you have Rule 5 before you. You heard about the ship running aground at Rio Hiana and how she ran aground.

Is this the Rule 5 situation, what we have here?

A In my professional opinion it is not a Rule 5 situation. It says when a ship is intentionally run on shore. This presupposes a ship which is afloat under power.

In the case of the stranding of the BEAUREGARD she was already aground and I submit that it does not fall into the working of this rule.

MR. MALOOF: I object to any further opinion from this witness on the ground that he is an agent from the plaintiff. He was the plaintiff's agent as the insurance broker and also as the general average adjuster.

THE COURT: All those things can be taken into account.

MR. MALOOF: It's not a professional opinion.

THE COURT: He says it is a professional opinion.

Whether he is right, that I have to decide.

Q Mr. Myerson, in arriving at the figures in your general average adjustment is that the opinion you applied in arriving at those figures, that this was not a Rule 5 situation?

A It was a Rule A situation. In the York-Antwerp Rules there is something called the rule of interpretation and it says the numbered rules -- if I may go on, you have six rules which have letters, A to E and those are general rules.

Then you have 24 rules which are numbered and there is a rule of interpretation which says that when it is not specifically covered in one of the numbered rules then the lettered rules which are more general apply.

Consequently in my professional opinion this numbered situation did not fit the circumstances because of

what I just recently said and consequently I followed the lettered rules.

Q Which lettered rule was that?

A Rule A.

Q Can you tell us briefly in your own words what does Rule A say?

A That the vessel has been in peril, that there has been expenses and sacrifices incurred to preserve from

peril.

Q You can read it.

A There is a general average act when and only when any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure.

THE COURT: This is what you told me.

MR. MALOOF: Yes, sir, but even if it's intentional it would not be covered because Rule 5 says if teh damage was inevitable in any event then it is not general average.

THE COURT: He says and it seems to me that Rule 5 only applies when it is an intentional grounding. There is no contention here that the grounding was intentional as far as I can see.

MR. MALOOF: They are saying the second position was intentional. This is a grounding. Pilot Torres says the ship came off the rock after the rope

broke. It grounded again. I don't see how we can make a distinction.

THE COURT: The way I hear the testimony, nobody intentionally put it on its second position. That was an accident.

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MR. MALOOF: I agree it was not intentionally done, therefore it could not be general average.

THE COURT: It doesn't seem to follow. My ignorance has known very few bounds.

MR. MALOOF: If it was known to happen anyhow it's not covered by the York-Antwerp Rules.

THE WITNESS: There is a second part of Rule 5 which if one accepts the contention which has just been made that says even when the ship is intentionally put on the ground the damage sustained in refloating is still made good in general average.

It is the second part of the rule, your Honor. I don't contend that the rule applies but if it's construed that the first part of the rule applies I might say in my professional opinion obviously the second part of the rule must apply, that the damage caused in refloating if proven.

Q When Sealand declared general average did that give them a lien on the cargo that was still on the ship?

A Yes, it did.

Q Were you involved in any way with the delivering of that cargo to -- or the releasing of the cargo to consignees?

A Yes, I was.

Q In what way?

A Well, the normal situation is the vessel owner does not release the cargo to the consignee in a general average situation and unless he receives something a guarantee -- which was discussed earlier in the case which is a guarantee to pay all proper general average charges.

Q Did the cargo underwriters give you any reason why they would not pay? Did they write any letter explaining why?

A They did write a letter to me saying they would not pay the general average because in their opinion the ship would have inevitably drifted from Position A to Position B.

CROSS EXAMINATION

BY MR. MALOOF:

Q What is the name of the company you are employed by?

A Freders James and Company of New York Incorporated which incorporates Despard International.

Q It was Despard International at the time of all your dealings in this affair?

A Yes.

Q When Sealand har a general average case whom do they hire?

A Despard.

Q Does Despard International do other work for Sealand?

A Yes.

Q Are they Sealand's insurance brokers?
A Yes, they are.
Q As Sealand's insurance brokers what are its duties?
A Since I am not an insurance broker, I only confine myself to the stating of general averages. I don't know if I can give a full answer to that.
Q Did you make no efforts to collect for Sealand under its policies?

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qjw 23 Myerson - cross

A Yes.
Q Isn't that what an insurance broker does?
THE COURT: You did or you did not make an effort.
THE WITNESS: Yes, I did make an effort.
Q Is that one of the duties of an insurance broker?
A Yes.
Q You did that, didn't you?
A Yes.
Q You acted as their insurance broker?
A Acted for the collection of an insurance claim.
Q Does that make you an agent for Sealand Services?
A Since I am not a lawyer I should leave it to the law to determine whether I am an agent.
Q Were you working for Sealand also as the

qjw 24 Myerson - cross

general average adjuster?

A On this case?

Q Yes.

A Yes.

THE COURT: Do you work for Sealand in a lot of cases?

THE WITNESS: Yes.

THE COURT: Do you work for anybody else?

THE WITNESS: Yes.

THE COURT: Sealand is one of your clients?

THE WTNESS: I can say Sealand is my principal client but I have other clients. I have other clients not concerned with insurance.

Q You weren't the agent for the cargo people, were you?

THE COURT: He is the agent for Sealand. Go to something else.

Q Was there any intentional sacrifice when the BEAUREGARD went on to the rocks in the first instance?

A No. None that I know of.

Q Was there any intentional sacrifice when she went onto the rocks in the second instance?

A Yes.

Q What was it, sir?

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A May I go back a bit?

THE COURT: Yes.

A After the vessel was refloated in Rio Haina and came up to Todd's Hoboken for repairs I thought the only thing we were concerned with as general average adjusters was the refloating expense of the Dominican Navy and also Puerto Rico Light Range and towage and pulling the vessel off the strand.

I got a telephone call after the ship was on drydock from Mr. Edward Ganly, who was employed by Sealand as a private surveyor telling me that they had noticed two distinct kinds of damage on the vessel's bottom.

The first damage was forward of the No. 1 hold which was horizontal -- I am sorry, longitudinal scaring up to the No. 1 hatch and also damage up on the port bow from resting against the damaged tanker.

This was clearly accidental damage which did not concern the cargo and did not concern the general average.

However, they found aft of the No. 1 hatch --

THE COURT: You mean the damage forward --

THE WITNESS: Has nothing to do with the general average.

THE COURT: The damage the ship suffered

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getting onto the rocks?

THE WITNESS: That is correct. I think that is conceded. However, they found many of the shell plates after the No. 1 hatch had what I can only call a horizontal scaring which was after the vessel was being refloated by the tug from Position A and the tow line parted she swung over to port and in moving to port she got this horizontal scaring.

They said to us that this appears to us to be damage in refloating.

THE COURT: Appeared to them?

THE WITNESS: Yes. It became up to me as a professional stater of averages as -- not all refloating damages are allowable but the question is whether this damage was.

Upon getting further opinion judging from the pattern we found onthe vessel's bow was that the vessel would have remained pretty much immovable in her first stranding position A other than for the fact as the tug was coming out there was a slack on the tow line and the tug picked up the slack on the tow line and broke the tow line.

I also asked the question if she had remained firm would she have had this damage and they said no.

I then asked what would happen if the tow line

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qjw 27 Myerson - cross

had not parted, she would have come cleanly off and we would have had only the damage, assuming nothing else happened, we would have had the damage forward of the No. 1 hatch.

Consequently, based on this and in my best professional opinion I stated this is general average.

Q As part of this amount which you sought from cargo, is your company's fee involved?

A Yes.

Q How much is it?

A My fee becomes part of the general average which is payable ratably by all those involved. Based on my apportionment I see of a total value of $6 million, cargo's contributory value, $3 million, so roughly half of

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qjw 28 Myerson - cross

my fee would have been paid by the cargo.

Q What was your fee, Mr. Myerson?

A My fee on this was $54,000.

THE COURT: Do you get that in cash?

THE WITNESS: I haven't gotten it yet.

THE COURT: Does the outcome of this action make any difference how much you get paid or when?

THE WITNESS: Of course technically the people who declare general average owe me my fee. Whether I choose to collect or not is another matter.

THE COURT: If they don't win that suit is it

customary for you not to get the fee?

THE WITNESS: That is correct, it is customary not.

Q Did I understand you correctly to say that you concluded this ship would not have moved if nothing had been done?

A Yes.

Q You concluded this without ever going to Rio Hiana?

A Yes, because --

THE COURT: If you can answer a question yes or no.

Q Did you also conclude this without ever going

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under that ship in drydock and looking at it?

A I did not look at the ship.

Q You are an office man, aren't you?

A Yes.

Q You look at papers.

A Yes.

Q When you are looking to come to a conclusion like this, will you tell the Court what elements you will consider, what facts do you look for?

A I usually look for the summaries of experienced maritime people, surveyors.

Q Who were involved?

A Yes.

Q Do you consider eyewitne ses important?

A We don't normally get eyewitnesses in stating a general average unless they are shown through the documents.

Q Did you get one in this case?

A Not that I know of.

Q I show you a document which is a letter dated September 18, 1969.

Was this send by Despard and Company to Sealand Services?

THE COURT: Despard was his employer?

THE WITNESS: Yes, the average adjuster and insurance broker.

A Yes, I have seen this letter.

Q Who is Mr. Carlson?

A My immediate superior.

Q Would you say that is his signature?

A Yes.

MR. MALOOF: Identification.

(Defendants' Exhibit C marked for identification)

Q Would you read the last two paragraphs out loud, please?

THE COURT: Is it in evidence?

MR. MALOOF: Identification.

THE COURT: Youcan't read it unless it is in evidence.

MR. MALOOF: I offer it.

MR. DE ORCHIS: May I see what it is?

I have no objection.

(Defendants' Exhibit C received in evidence)

Q You know about this letter?

A Yes, it's in my file.

Q Can we say then that the case did hing upon the

remarks of Captain Boehm?

A That is Mr. Carlson's opinion.

Q Do you dispute Mr. Carlson?

A I am merely stating the general average.

Q Isn't he your superior at Despard and Company?

A I don't always agree with him.

Q Do you agree or disagree with the last two paragraphs?

A I agree with the next to last paragraph and insofar as the case hinging upon the remarks of the master, I leave that to the Court.

THE COURT: What do you agree with?

THE WITNESS: The third paragraph.

THE COURT: The primary question is whether the second position obtained by the vessel was knowingly and intentionally risked .. by · the master in the effort to refloat, do you agree that is the issue before me?

Counsel doesn't seem to think so. That is what I thought was the issue but then I was told by counsel that it was not.

MR. MALOOF: It's only one of the issues.

THE WITNESS: I hold it is one of the important issues.

Q You said here that you didn't take into account any of the eyewitnesses in this case in reaching your opinion.

A We don't ordinarily.

Q You said you didn't do it.

A I didn't in this case.

THE COURT: I am going to have to decide what portions of the damage, the question of when they occurred are allowable in general average and which are not.

The question I asked you is after I have announced that decision, can you take that document and mathematically figure out which come within the allowance and which come without the allowance.

MR. MALOOF: I think we can.

THE COURT: Why do you want to bother this fellow?

MR. MALOOF: This fellow testified that the ship wasn't going to move from Position A.

THE COURT: I know enough to know that an office man isn't the one that is going to tell me that.

MR. MALOOF: I have no further questions on that point then.

THE COURT: He told you that was his assumption when he drew the document. If his assumption is wrong, well, that is it.

Q Mr. Myerson, do you have an opinion -- I withdraw that, your Honor.

Mr. Myerson, did there come a time in your preparation of this general average affair where you received an opinion from a surveyor named Ganly?

A Yes.

Q Did you take any steps, as we say in the medical profession, to get a second opinion?

A Yes.

Q To whom did you --

A A second opinion from a different person?

Q Yes.

A No.

Q Who is Mr. Lindsay?

A Mr. Lindsay is a marine surveyor in New York who we generally go to for professional advice.

However, his sole function in this, there is something in general average on ship damage called thirds off. You will see it in the York-Antwerp Rules.

This is to say that if a part of a ship has been voluntarily sacrificed and it is over a certain age, that if the shipowner receives the full price he is in a

better position.

It is a depreciation agreed on by the age of various items. I went to Mr. Lindsay to have this marked for thirds off which was his entire function in that adjustment.

Q Was it done?

A Yes.

Q It was thirds off?

A Yes.

Q Why? Because the ship was so old?

A Because of the provisions of the York-Antwerp Rules which requires certain deductions on ships past certain ages.

Q It depends on age?

A Yes.

Q And it was done?

A Yes.

Q Do you have his opinion with you?

A I don't have it with me. He never gave a formal opinion. What he did do is give me a sheet of paper showing the mathematical calculations. I can produce that.

THE COURT: You can?

THE WITNESS: Yes, I still have it.

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Q I show you a letter, Mr. Myerson, dated November 7th, a copy of a letter, 1968, and ask you if you didn't send the original of this letter to Mr. Lindsay?

A Yes.

MR. MALOOF: Identification.

(Defendants' Exhibit D marked for identification)

MR. MALOOF: I offer this in evidence.

MR. DE ORCHIS: No objection.

(Defendants' Exhibit D received in evidence)

Q I show you another letter and ask you if you didn't send the original of this one to Mr. Lindsay?

A Yes, I did.

MR. MALOOF: Identification.

(Defendants' Exhibit E marked for identification)

MR. MALOOF: I offer it in evidence.

MR. DE ORCHIS: No objection.

(Defendants' Exhibit E received in evidence)

Q Can we agree that you wanted more from Mr. Lindsay than one-thirds?

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A May I see these?

Q Yes.

A Yes, I think you have refreshed my memory.

Q Would we say that differently, were you trying to beguile the Court?

A No, I was not trying to beguile the Court. This letter was dated seven years ago.

THE COURT: What is the relevance of this?

MR. MALOOF: The relevance is to let the Court know that Mr. Myerson did not mean the truth when he said he only wanted from Lindsay.

The reason is they did go for a second opinion

on Mr. Ganly's and Mr. Lindsay I believe disagreed but I have never been able to get a copy of his report and I mean to get it now.

I saw all of Mr. Myerson's file at one time but there was nothing in there from Mr. Lindsay except a bill that you paid.

THE WITNESS: To the best of my memory Mr. Lindsay did not write a report.

Q Did he give you an oral report?

A He telephoned Mr. Ganly and when we went to discuss the markings of the thirds off old for new he said Mr. Myerson you know this ship moved and I said yes and he

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said however I think Mr. Ganly would be able to tell you about that and to the best of my memory he telephoned Mr. Ganly and Mr. Lindsay said to me it's no problem.

Q Do you know what Mr. Lindsay told Mr. Ganly, whether he agreed or disagreed with his opinion?

A I think he agreed with Mr. Ganly's opinion.

Q You think.

A You have to ask Mr. Lindsay.

Q Let me refresh your recollection again.

On Defendants' Exhibit D you say, should you have any further difficulty in reconciling the refloating damage with the vessel's movements after grounding, we suggest that you discuss the matter with Mr. Ganly.

Would you still say he agreed with Mr. Ganly?

A Yes.

Q What difficulty in reconciling did he have?

A The fact that the vessel had moved.

Q You mean the fact that it moved when they said it would not have would be a matter for reconciliation, wouldn't it?

A He merely told me that the vessel moved from Position A to Position B.

Q Is that all there was to it?

THE COURT: Why did that need reconciliation?

THE WITNESS: There is a question that it could have been accidental rather than intentional and he wanted to be sure before he marked this.

I suggest you ask Mr. Lindsay about that.

Q Mr. Lindsay has been subpoenaed. However, he is an old man and if we can learn from you what his opinion was we would not have to bring him from New Jersey.

Why don't you tell us. You are the average adjuster.

THE COURT: Don't make speeches.

Q Can you then tell us what was the need for reconciliation?

A I have just told you.

Q Didn't Mr. Lindsay disagree that this was refloating damage?

A No, Mr. Lindsay told me the ship moved from A to B.

Q Everybody knows that.

A And he telephoned Mr. Canly to findout what

had seen the ship.

Q To find out what it was moved from A to B?

A To find out why we were including it in general average. 155

Q He questioned it?

qjw 43 Myerson - cross

A Yes.

Q Then he disagreed with Mr. Ganley?

A I don't know. You have to ask them.

THE COURT: He wasn't there.

MR. MALOOF: No, he was not there or in Rio Hiana or anyplace.

Q I show you a copy of a letter dated June 13th from Mr. Spitz of Sealand which encloses a statement from a Mr. Collie.

Would you identify that please and did your office receive that in the ordinary course of business?

A Yes.

MR. MALOOF: Identification.

(Defendants' Exhibit F marked for identification)

MR. MALOOF: I offer it in evidence.

MR. DE ORCHIS: I don't see the relevancy of any of this. This has to do that the Santo Domingo Navy claim was settled for much less than the Navy wanted.

MR. MALOOF: There is more than that in there.

THE COURT: Why is it relevant?

MR. MALOOF: This is a memo from Mr. Collie, your Honor, who was the marine superintendent for Sealand in the Dominican Republic and I wantsome of these admissions

qjw 44 Myerson - cross

in here.

In the first instance because of the urgency in floating the BEAUREGARD before she further beached herself.

This was the man in charge. I think it belongs in the case.

THE COURT: We know that was urgent.

MR. MALOOF: Before she further beached herself which means it was inevitable in his opinion.

THE COURT: It doesn't mean it is inevitable in his opinion.

MR. MALOOF: It meant he thought it was.

THE COURT: He thought it might happen.

MR. MALOOF: There was an urgency.

THE COURT: There is a difference between urgent and inevitable.

MR. MALOOF: Nevertheless it's important that all the eyewitnesses agree.

THE COURT: All the eyewitnesses agree that it was possible and dangerous.

MR. MALOOF: And likely to happen.

THE COURT: But that is not inevitable.

MR. MALOOF: There is no proof at all that it wouldn't move. The prevailing winds were coming from

qjw 45 Myerson - cross

the east. It had to go in that direction.

THE COURT: I am not disputing that. I am merely saying a statement by a witness that something is likely we already have in evidence.

MR. MALOOF: This ought to be in the record.

THE COURT: Put it in and get on to something else.

I say it's likely it's going to rain tonight. That doesn't mean it's going to inevitably rain.

MR. MALOOF: I take issue with that analogy.

(Defendants' Exhibit F received in evidence)

THE COURT: If I take a 50-to-1 bet on a football game it's very likely that I am going to win but not inevitable I am going to lose.

MR. MALOOF: We are talking about a ship that was damaged $400,000 --

THE COURT: You told me it's your burden to prove it's inevitable.

MR. MALOOF: It's the plaintiff's burden to prove this was a general average.

THE COURT: You told me that inevitable is the issue and 1,000 statements that something is likely

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qjw 46 Myerson - cross

does not prove it is inevitable.

MR. MALOOF: The burden is the plaintiff's.

THE COURT: Inevitability is something that has to be proved one way or another.

MR. MALOOF: Plaintiff has to prove it was an intentional act and not inevitable.

THE COURT: Get me straight. I thought I understood in the first place and you told me it was not true. You told me that once the thing is beached any effort, legitimate effort to create sufficient cause to save the common enterprise is general average.

MR. MALOOF: If there is an intentional sacrifice, right.

THE COURT: But all the sacrifice is to spend money to get the ship off. I started onthe theory of the pyaments to the tug and the damage.

MR. MALOOF: And the damage when it comes off the rocks.

THE COURT: Obviously the damage that followed was a consequence of the ship breaking, of the rope breaking.

MR. MALOOF: They have to prove that causation.

THE COURT: That is obvious as the nose on your face. If the rope didn't break and the ship had come off

qjw 47 Myerson - cross

and floated --

MR. MALOOF: It's not that obvious to me. This ship was only 20 feet on the rocks. It's 468 feet long. The rest is floating.

THE COURT: It is not obvious to you that if the rope had not broken and the ship floated away there would be no damage?

MR. MALOOF: That is obvious.

THE COURT: What is the use of the word inevitable?

MR. MALOOF: That is what I am using.

THE COURT: Likely and inevitable are two different things.

MR. MALOOF: It had to happen. What else could happen?

THE COURT: It could have stayed there.

MR. MALOOF: Your Honor might conclude that it would stay there.

THE COURT: Stop telling me that people thought she wouldn't.

MR. MALOOF: We have to take --

THE COURT: I take judicial notice that every eyewitness there, because it has been told me by the plaintiff's witness --

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MR. MALOOF: May I turn this around and say it's the plaintiff's burden to prove it wasn't going to move and that is our position.

THE COURT: But please assume -- maybe I have demonstrated to the contrary, but assume that I have the brains I was born with that when the plaintiff's witness testifies that everybody there thought it was likely this would happen that I accept that as a fact and don't want to spend two hours hearing about it again.

THE COURT: It clearly was not intentional. I don't see how anyone can say this was intended to drive it up the second time. It seems to me from what I have heard that any such contention would be ridiculous. It landed in the first place. That was concededly an accident.

Then they tried to pull it off. They failed in pulling it off. Subsequently the ship landed up on the second point. Nobody can contend rationally on the basis of what I have heard that they intended at the time they started pulling it off the first point that they intended to land it on the second point not unless they were all a bunch of certifiable idiots. That was an accident.

If that rule that you were allowing talking

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about intentional or whatever, if it is a defense that it would have been inevitable had they done nothing it would have been inevitable to shift then to land in substantially

the same position then we try that issue.

That is a relatively simple issue and it seems to me inevitable would be a very difficult word.

If inevitable means inevitable I don't see how you are going to prove it because it seems to me obviously it wasn't inevitable.

The wind could have dropped, any number of things could have happened if they just left it there. If inevitable means what it means in ordinary English I would say it's not inevitable.

THE COURT: He could if he wanted to but he has no inclination.

What I have just said leads me to believe that inevitable has somewhat less inevitability in this meaning than that. That is one issue.

THE COURT: Unless the thing was unseaworthy or you have the defense of the mate or the harbor master interferring, it seems to me if the rope was unseaworthy, that is another thing and mayhe there were other blunders that I haven't heard about.

But aisde from the possibility that the rope was unseaworthy, I don't see -- so far there hasn't been suggested to me that anything wrong was done.

They are on this strand. There are no tugs available except this one, they took this tug, as the best available means and it proved inadequate. That having

qjw 54 Myerson - cross

proved inadequate the ship landed in its second position.

Obviously you could not leave it there. If you left it there you are going to lose both cargo and ship so you had to pull it off.

I don't see what your point is on that because if they left it where it was, it's stranded without anybody's fault -- we are assuming without anybody's fault at this point becuase if it was unseaworthy or the harbor master was to blame then the lawsuit is over.

We got to this point. We are stranded without anybody's fault. The skipper at that point could either have decided to leave it there or to get the tug to pull it off. If he left it there one of two things would have happened.

It would either stay there until the next morning and new tugs would come in and pull it off or it would have swung the way it ultimately did and new tugs would pull it off.

I see your point. If they left it there and it swung and no attempt to pull it off was made then you would not be responsible for teh damage that happened when it swung, you would be responsible only --

MR. MALOOF: It would have been a continuation of an initial stranding. They didn't effect the situation

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qjw 55 Myerson - cross

one way or the other, your Honor.

THE COURT: The issue is whether pulling it off --

MR. MALOOF: Caused the second position. Did it or didn't it.

THE COURT: Whether pulling it off was the causative factor of the second position.

MR. MALOOF: That is one of the issues.

THE COURT: That has got nothing to do with inevitability.

MR. MALOOF: That is a different theory.

THE COURT: All right.

THE COURT: You can't be telling me that you say you intentionally took the second position.

MR. DE ORCHIS: Rule A says that any sacrifice we make in the general average, it uses the word voluntary and intentional sacrifice.

What that means is the expenditure, deliberately decide to take a risk. That we did.

Intentionally take the risk that a rope might break, that we might go over. But not we intended to land on the strand. We intended the opposite, to get pulled off safe.

THE COURT: Then you didn't take any risk. That is not a question of inevitably. Your own witnesses say that it would have been dangerous to the ship to leave it there.

MR. DE ORCHIS: That is right.

THE COURT: The witness said that if he were there, regardless whether there is cargo on the ship

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or not he would have done exactly what was done.

MR. DE ORCHIS: That is correct.

THE COURT: Therefore taking it off was not an intentional assumption or risk.

MR. DE ORCHIS: When we took the boat off and asked the tugboat to pull we were taking the risk that the line might break.

THE COURT: Unless there is causation between the line breaking and the ship going to a second position, unless there is causation between the line breaking and the ship going to a second position then it wasn't part of the operation.

MR. DE ORCHIS: That is right. We have to show that this was a risk that we took and the grounding was one of the things that we took a risk might happen.

As distinguished from an intervening cause, if the captain was drunk and ran into the ship and damaged it, that would not be general damage. That is an intervening cause.

But a line breaking is foreseeable, several groundings before you get her off. They say we shouldn't get paid for going up on the beach because inevitably when she goes aground she would go up to the beach.

That does not follow.

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When she went aground she stuck there fast and did not move for ten minutes until the tugboat came and ten more minutes until the rope parted. When the rope parted she moved. Then getting her off is general average.

THE COURT: The crux of your argument ends on what you need to prove.

MR. DE ORCHIS: I have to prove that I intentionally called a tugboat to help.

THE COURT: Obviously you did that.

MR. DE ORCHIS: And that as a matter of law, because there are a lot of cases on this, could foresee that a line might break.

THE COURT: That is obvious too.

If all you have ot prove is you are stuck here which is not very difficult to prove. You are stuck, you call a tugboat to pull you off, the line breaks and then the ship goes over to the side.

If you prove that in fact the breaking of the line is what caused the ship to go over, it seems to me that it's no answer to your case that it might have happened anyway. That is if you proved it did happen for this reason.

MR. DE ORCHIS: That is right. That becomes all part of the salvage operation. Not every step is successful. That should be very obvious. In trying to save

qjw 59 Myerson - cross

a ship you are going to break lines, damage tugboats, all kinds of unlucky things will happen until you survive.

Where the courts do not allow a recovery is where there is an intervening cause which breaks up the effort, something entirely different.

For example, there was a case where a ship when it came loose some pirates came and grabbed the ship.

THE COURT: That is not his point. This wasn't an intervening cause but that the breaking of the line was just a coincidence and had nothing to do with the damage.

MR. DE ORCHIS: He is saying inevitably I would have swung over.

THE COURT: In that situation he has hoist himself on his own petard by inevitable.

MR. MALOOF: Inevitable only as to Rule 5. Causation, if it was going or likely to happen then that is important there.

THE COURT: If you shoot a man that is dying of cancer --

MR. MALOOF: You have done nothing to hurt him.

THE COURT: Did the shooting kill him or cancer five minutes later.

MR. MALOOF: If all the eyewitnesses say --

THE COURT: You accepted my analogy too easily. If all the doctors agreed that he would have died ten minutes later it's still murder.

MR. DE ORCHIS: Except this patient didn't die.

MR. MALOOF: The ship moved at the time.

THE COURT: Using the engines was part of the operation.

MR. MALOOF: When you are aiming the ship out to sea, did that cause the second grounding?

THE COURT: It seems to me the issue is was it material, not inevitable, but was it materially more likely that this happened because of the pulling than if they had pulled it?

The fact it might have happened anyway doesn't seem to me to be an answer. The degree of worry expressed by the various people, eyewitnesses, of course would be relevant on that issue. Whether it's materially more likely, it seems to me that then is the issue.

Is it materially -- and I guess plaintiff has the burden of proof on this.

MR. MALOOF: That is true.

MR. DE ORCHIS: If your Honor will glance at

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the sketch you will see at Position A her port bow was up against that sunken tanker. She would not have moved because the tanker was acting as a fulcrum. This is our ship and here is the tanker.

THE COURT: If you were confident of that you would have left her there.

MR. DE ORCHIS: No, because when she is aground she can hold herself at any minute and we are lost. What I am saying is when we pulled her back with the tugboat before the line parted that is what allowed her to do this and change position.

But that is the risk we took and gladly because we saved the ship eventually and the cargo.

THE COURT: I think like experts in all fields we get to talking in set phrases to deflect thought. It's not the question of your taking the risk, it's the question of your expending money to save this ship and if this happened, if the second grounding was in fact caused by the pulling off it doesn't seem to me relevant -- you might have had a worse disaster if you didn't pull off.

MR. MALOOF: That is not really the question in the case. I agree with your Honor that the plaintiff must prove causation.

qjw 62 Myerson - cross

THE COURT: You have to prove causation. It seems to me you confuse things by talking about accepting risks.

MR. MALOOF: Mr. Mello testified it was the wind and the weather that brought it over.

THE COURT: But the wind and weather would have a different effect on a securely stuck ship --

MR. MALOOF: With the engines alone they moved the ship before the tug came out.

MR. DE ORCHIS: Where is that?

MR. MALOOF: In the testimony.

THE COURT: That seems to me the issue, not if it evitably had gone there. But did pulling off with tug and motor, the whole thing in operation, materially increase the likelihood of this particular damage happening?

If it didn't materially increase the likelihood it seems to me it's part of the operation. If it didn't there is no causation.

MR. MALOOF: We only have eyewitnesses to go by.

THE COURT: I have to evaluate their testimony.

MR. MALOOF: There is no eyewitness who has testified yet.

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Stop it, you are making it worse for yourself. Go on with the case.

MR. DE ORCHIS: Yesterday you asked us to try to agree to as many things as possible. We agreed that all of the documents that are listed in the pretrial order, both the plaintiff's documents and the defendants' documents all of those may be offered and no one will except that they are originals or not. They may all go in evidence without taking up identifying the documents or authenticating them.

I think we agreed that the only issue before your Honor of damage is whether the damage caused to the bottom of the vessel as she went on the strand after the rope parted, whether that part is recoverable. They admit the rest is recoverable.

Am I correct?

MR. MALOOF: I didn't get your point because I couldn't hear it too well.

MR DE ORCHIS: I said to his Honor that we boiled down the issue, theonly issue of damages whether we can recover or not is whether that part of the bottom damage which was caused when she went on the strand after the line parted, whether the plaintiff has a right to recover for that item, but as to all other refloating

Court - Colloquy - 181, 183, 184

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items you concede.

MR. MALOOF: Subject to my arguments about unseaworthiness and Mr. Collie, I do agree with that, your Honor.

MR. DE ORCHIS: As to the depositions, your Honor, we have the deposition of the master of the ship, Captain Harold J. Boehm, which was taken in New York on March 6, 1974. I make a representation to the Court that the captain, Captain Boehm, is now in the Far East and the last time I heard he is in Yokohama, which was the other day. I offer his deposition in evidence.

MR. DE ORCHIS: I offer next the deposition taken of one of the plaintiff's witnesses, Mr.Torres, which was taken February 24, 1975. We will mark this copy the same way, black for the plaintiff and red for the defendant.

(Plaintiff's Exhibit 9 was received in evidence.)

MR. DE ORCHIS: We offer next in evidence a deposition of another one of the defendants' witnesses,

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Mr. Rojo Calderon, which was taken in Santo Domingo on February 24, 1975.

(Plaintiff's Exhibit 10 was received in evidence.)

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M A N U E L F E L I Z, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DE ORCHIS:

Q By whom are you employed?

A I work for Sealand in Santo Domingo.

Q What is your job?

A Assistant to the operations manager.

Q How long have you worked for Sealand in Santo Domingo?

A Nine years.

Q You were employed in 1967?

A Yes.

Q Do you remember the incident when the Beauregard ran ashore at Rio Haina?

A Yes, I remember. I was over there.

Q You were at Rio Haina that day?

A Yes.

Q Was there someone with you?

A Mr. Collie and another employee.

Q Who is Mr. Collie?

A Mr. Collie was operations manager.

Q Is Mr. Collie alive today?

qb Feliz-direct 219

A No, Mr. Collie is dead.

Q Wereyou and Mr. Collie together all the time at Rio Haina?

A Yes, sir.

THE COURT: When did he di?

THE WITNESS: Two years ago.

MR. MALOOF: I object to the leading questions. This is Mr. DeOrchis' own witness.

THE COURT: These are preliminary questions.

Q Mr.Feliz, have I ever talked to you about this case before?

A No.

Q When did you arrive here?

A I received an advice to come over here.

Q When did you arrive in New York?

A Last night, 11:00 o'clock.

Q When is the first time you saw me?

A I saw you the first time in Santo Domingo.

Q After you arrived last night?

A Right now.

Q I want to ask you just two questions. The pilot in this case, Mr. Torres, you know Mr. Torres?

A Yes.

Q The pilot says in his testimony that before he

qb Feliz-direct 220

took his little boat and went out to the Beauregard that he complained to you about the weather, said the weather was too bad to bring the ship in.

Can you tell us whether that is true or not?

A No, that is not true because when we saw the BEauregard it was clear and the pilot took his boat and go on board. The Beauregard goes around and take the pilot and start to enter. The truth was at that time it started to rain and it was dark, that is true.

Q Did she then make another turn?

A Yes.

Q And that is when the accident happened?

A Yes.

Q Before the pilot went out did you have any conversation with the pilot?

A No, it is not customary to have conversation with the pilot because the pilot when he is outside he immediately takes his boat and goes. We give advice four hours before the ship arrives.

THE COURT: You give advice four hours?

THE WITNESS: Yes, sir, to the pilot and port authorities.

Q Four hours before ships arrive you tell the pilot what time to be ready?

qb Feliz-direct 221

A Right.

Q The other point, the pilot, Mr. Torres, has testified that while he was on the ship, on the bridge of the Beauregard, that he was talking on the radio telephone, the ship's radio, that he was talking with Mr. Collie who was somewhere ashore as the ship was maneuvering out there.

Can you tell us whether Mr. Collie was talking on any radio with the ship when the ship was maneuvering out there?

A I don't believe so, because Mr. Collie only has a walkie-talkie. A walkie-talkig is too small because it doesn't reach the bridge. They only use the walkie-talkie when the ship arrive in the dock to move it back and forth, that is all.

Q Just from the dock up to the bridge up to the ship?

A I don't believe so. The walkie-talkies don't reach the ship.

THE COURT: It doesn't reach out?

THE WITNESS: You use the walkie-talki when the ship is in the dock.

THE COURT: But there is a radio in the port master shop?

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qb Feliz-direct cross 222

THE WITNESS: We haven't.

Q Not whetheryou have a radio, is there a radio in the port captain's office?

A No, we haven't.

Q During the time that you were waiting for the Beauregard was Mr.Collie with you all the time?

A Yes, together.

MR. DE ORCHIS: No further questions.

THE COURT: I take it Mr. Collie was not deposed on this issue?

MR. MALOOF: No, he died before we could take his deposition.

THE COURT: Nobody claims the other side killed him.

MR.M ALOOF: I do believe there were mysterious circumstances, but I am not about to testify about it.

CROSS-EXAMINATION

BY MR. MALOOF:

Q Will you tell us whether Mr. Collie had any connection with the people in the Dominican Government?

A In the DominicanRepublic it is completely different from the States. Because myself and other people is working over there has connection with all the Government.

For instance, I arrived yesterday to Puerto Rico,

qb Felix-cross 223

and bring to Puerto Rico some Custom authorities, bit Custom authorities for the facility of Sealand. It start with the president of the Republic to the sweeper. We have connections.

Q Are you a relative of the president?

A Yes.

Q What relationship?

A I talk with him.

Q What relationship?

A He has an inaguration, I greeted to him, you know.

Q You are not a blood relative?

A No.

Q But it is necessary for Sealand Services and the DominicanRepublic to work closely together?

A No.

Q It isn't necessary?

A No.

Q At the time the Beauregard was trying to come in to Rio Haina, had you performed some duties with respect to having stevedores standing by?

A Yes, I told you and we have a necessary advice to stevedores and the authorities four hours before the ship arrives.

qb Felix-cross 224

Q What time would you have told the stevedores to be ready?

A Five o'clock or something like that.

Q Something like five o'clock?

A Something like that. I don't remember exactly.

Q Can we say then that you expected the Beauregard to dock at five o'clock?

A Yes.

Q Did you also make arrangements to have a tugboat available to assist the Beauregard to dock?

A Sometime the Navy was there with the tugboat and sometimes the Navy has a tugboat and sometimes not. In that case the Navy has tugboat available.

Q On this occasions they had one?

A They have one, sure.

Q Had you hired that tugboat to stand by?

A Yes.

Q Did you tell --

A No, the port commander.

THE COURT: What?

THE WITNESS: The port commander give authorization for the tugboat to stand by.

Q Did you ask the port commander to have a tug available?

qb Felix-cross 225

A No, because we don't need to ask because we give advice to the port commander four hours before.

Q And the port commander takes care of it?

A Sure.

Q On this occasion there was a tug there?

A Yes, he has a tug.

THE COURT: Does the port commander have a radio?

THE WITNESS: The port commander has a radio, at that time. Right now it doesn't.

THE COURT: At that time it did?

THE WITNESS: Yes.

THE COURT: Did Mr. Collie go in the port commander's office during this time?

THE WITNESS: No. Mr. Collie was together with me on the dock. The dock of the entrance is about three-quarters of a mile.

Q What are your duties, sir, when a ship like the Beauregard comes in to port?

A We see the Beauregard about two miles. It was clear.

Q I don't think you understand the question, sir. What are your duties when a ship like the Beauregard comes in to port?

qb Felix-cross 226

A What I does?

Q Yes.

A Only wait in the dock.

Q Is this your job?

A This is my job.

Q Nothing else?

A Nothing else. After the ship arrived, I go on board and clear the ship with the authorities, for the Custom authorities. I go on board, clear the ship and give the stevedore all the papers and after the ship is clear, I start to work on board.

Q Did Mr. Collie have any duties for Sealand Services at that time?

A Mr. Collie was in Santo Domingo -- only was Mr. Collie and myself. I was his helper, you know. We have a necessity to stay over there. Sometimes I was working on board and Mr. Collie was working in the warehouse loading the trailers of the cocoa beans or coffee --

THE COURT: Doing what with them?

THE WITNESS: Loading containers. Because we put into the warehouse because we have no empty containers and we put them into the warehouse the cocoa beans or coffee, and when they start unloading the ship, empty containers, I send to Mr. Collie and Mr. Collie and some

qb Feliz-cross 227

man loaded the container and go out to the ship.

Q Was Mr. Collie supervising the loading of the containers?

A No, over there in the house. When we have no empty containers -- in that case, I remember we have about 5000 sacks of cocoa beans in the warehouse and Mr. Collie --

Q WEre those cocoa beans going to be loaded in the BEauregard?

A Yes.

THE COURT: Was this this particular voyage or in general?

THE WITNESS: More or less this is in general. Right now the situation changed because we have more equipment. At that time we had no equipment. At that time we only had 96 containers. Right now we have 360.

Q The big ones?

A Yes.

Q But on this occasion these cocoa beans in containers were going to be loaded onto the Beauregard on this voyage?

A Yes.

Q And Mr. Collie was supervising the loading of the containers?

A Yes, into the warehouse.

qb Feliz-cross 228

Q And where was the warehouse, sir?

A The warehouse is the customer warehouse, you know Sealand's facility in Haina.

Q Roughly, but I want you to tell us.

A There are two warehouses. In one of them where Mr. Collei was loading, I discharge the empty containers and give instructions to the drivers to carry to Mr. Collie for loading and that is the case when Mr. Collie was in Rio Haina dock.

Q He was in the warehouse?

A After the ship entered that was his job. My job was on board.

Q You went aboard?

A Yes.

Q Before the ship entered nobody was loading the containers with coffee?

A No, because no containers.

Q You needed empty containers?

A Yes.

Q Did Mr. Collie after the stranding go to the port commander's office?

A I don't remember. It was not arranged, because Mr.Collie and myself were in the Sealand dock waiting for the ship, and he has only a walkie-talkig, but I don't

qb Felix-cross 229

remember --

Q He might have been still on the dock with you?

A Yes.

Q Even after the stranding?

A Yes. When we saw that the Beauregard start to enter, we expect the ship arrive, but some time pass, about 15 minutes and the ship no move and then Mr. Collie, I myself go to another near theBeauregard, and saw that the ship was grounded.

THE COURT: The question is, after that did Mr. Collie go to the port commander's office?

THE WITNESS: I don't remember so.

Q Was Mr. Collie the brother-in-law of the Admiral in charge of the Cominican Navy?

A He was brother-in-law of the Dominican Navy.

THE COURT: Brother-in-law --

THE WITNESS: To the chief of the Dominican Navy.

Q I think you said there was another employee who worked at the port with you. What was his name?

A Another employee? We have a lot of them. They change, you know. At that time only myself and the Sealand stuff in the Dominican Republic.

Q Now, sir, on this day, May 5, 1967, at this

qb Felix-cross 230

time which was, as you say you expected the ship at 5:00, let's say a quarter to 6:00, what was the weather like in Rio Haina?

A The weather was too far. Normally.

Q I am afraid I didn't understand that.

Would you mind repeating it slowly?

A It was fine.

Q It was good weather?

A Not good weather because it is cloudy, but it is not ranging because I remember myself and Mr. Collie and all the stevedores was in the dock, but never has a raincoat, you know. It was not raining.

THE COURT: What time was this?

THE WITNESS: We arrived over there about 3:30, 4:00 o'clock awaiting for the ship.

Q You say when you were waiting for the ship it was not raining?

A Not raining.

Q When did it next rain?

A When I saw -- when I saw the ship around two miles out it was not raining. The pilot took his boat and go on board. After the pilot was on board, it start to rain and the entrance was too dark.

Q There was no rain before that time?

qb Felix-cross 231

A No, it was raining in the day.

Q During the day?

A It was raning during the day.

Q Would you say it was raining and not raining intermittently rain, on and off, it sometimes rained and sometimes didn't rain?

A Right. In that time we was in the dock it was not raining.

Q At that period?

A Yes.

Q What was the visibility, how well could you see?

A I told you about two or three miles.

Q You could see theBeauregard?

A From theSealand facility I saw the Beauregard over there. And the pilot too.

THE COURT: You saw the pilot or the pilot saw the Beauregard?

THE WITNESS: The pilot saw the Beauregard first than I can see it, because the port commander is too clear for him to see.

Q At the time when it wasn't raining couldyou see the rain in the distance easterly? Could you see any rain coming?

qb Feliz-cross 232

A Right, we see the raining.

Q You can see it coming before it comes?

A Before it comes. I told you it rains sometimes and not raining sometimes.

THE COURT: His question is it might not be raining where you are, but can you see the rain somewhere else?

THE WITNESS: No. When we see the ship wasn't raining.

Q It wasn't raining any place?

A Any place.

Q That you could see?

A The proof is that the pilot take his boat and go on board.

Q I am surprised youcan recall so well, but we will take advantage of your fine memory. How was the wind at that time?

A I can't hazard an idea of how many miles. I am not sailor.

Q In your own words.

A It is not too strong. It is windy, but not too strong, two, five miles.

Q Nothing, right?

A For myself I can't give to you the exact answer, the strength of the wind.

qb Feliz-cross 233

Q This is the usual kind of windyou would say? A nice trade wind, the kind of wind tourists come for?

A Right. In Rio Haina there is a difference because sometimes we have no wind, but in five minutes there comes wind.

Q Was that happening that day?

A Over there.

Q At that time?

A At that time, yes.

Q So there were gusts of wind, is that what you mean?

A Gusts of -ind?

THE COURT: He described a gust of wind.

Q You only worked for Sealand for one year up to 1967?

A Yes,sir.

Q But you are a Dominican citizen?

A Yes.

Q Do you live in Rio Haina?

A No, I live in Santo Domingo.

Q How far away is that?

A That is about 17 kilometers, because over there the distance is in kilomters, not miles.

THE COURT: Do you work for Sealand now?

qb Feliz-cross 234

THE WITNESS: Yes.

Q Mr.Feliz, after the stranding, did you go to see Pilot Torres, talk to him?

A Did we call the pilot?

Q Did you speak with him some place?

A No, I speak all the time because we are friends.

Q Did you speak to him about this stranding?

A No.

Q YOu never mentioned it?

A No, I no see him. Right now the pilot is in another place. It is in Panalez, I believe so.

THE COURT: You are there on the dock and you see the boat stranded and subsequently the pilot gets off the boat.

He is a friend of yours?

THE WITNESS: No.

THE COURT: He got off the boat.

THE WITNESS: I understand.

THE COURT: Did you talk to him or say hello?

THE WITNESS: I saw the pilot when he take his boat.

THE COURT: This is after the stranding.

THE WITNESS: I know. I saw the pilot all

qb Feliz-cross 235

day.

THE COURT: Did you talk to him?

THE WITNESS: Because we are friends.

THE COURT: What did you say to him about this experience?

THE WITNESS: His experience? The pilot is a good pilot.

THE COURT: After the accident the pilot gets off the ship andyou and he said hello to each other and you must have talked about the stranding.

THE WITNESS: I don't understand.

THE COURT: We just had this stranding, right? The pilot is your friend. He gets off the ship.

THE WITNESS: Yes.

THE COURT: You say hello to him.

THE WITNESS: Yes.

THE COURT: Didn't you have a conversation about what just happened?

THE WITNESS: After that?

THE COURT: Yes.

THE WITNESS: We have a conversation. He entered the ship because -- let me tell you something, myself from my experience sometimes I go to the pilot or

qb Feliz-cross 236

pilot go out and enter the ship. He would be foolish. When there is a strong stream or it is too dark or sometimes there is another ship, he would be foolish. I don't believe because he entered the ship.

THE COURT: What we are trying to get at is that after the accident was all over and the next time you met the pilot, which would have been that evening, did you have a conversation?

THE WITNESS: He said it was an accident.

THE COURT: Did he say how it happened?

THE WITNESS: No. He don't explain to me what happened. This is only an accident.

Then the pilot has another accident, it was a small boat. Rio Haina is about only 18 container carrying, and he go around to the ship, but this is night-time.

Q He was bringing this boat in in the nighttime?

A In the nighttime, but this is out.

Q Going out?

A After we finish the operation.

Q What timeof the night was it?

A This is about eighto'clock or nine o'clock.

THE COURT: This was another time entirely?

THE WITNESS: Not this same time. It was

qb Feliz-cross 237

another time. It was an accident, you know.

THE COURT: Was it before or after?

THE WITNESS: After that because we have Rio Haina after that Beauregard.

Q I think you said also that Mr.Torres, Captain Torres, if there was too much wind or too much current he wouldn't bring a ship in.

A No.

Q He was very cautious?

A Yes.

Q Did you see Captain Torres in February of this year, 1975?

A In February? Yes, I saw him.

Q Why did you see --

A The time you was in Santo Domingo, in February?

Q Yes.

A Right, I saw him.

Q Did youtalk about this case?

A No.

Q Did you call him at home?

A No. Only I see him because I told you, we are friends.

Q And you remember seeing him in February?

A In February.

qb Feliz-cross 238

THE COURT: That is when Mr. Maloof was there?

Q When Mr. Kennedy was there?

A Yes.

Q You saw him then?

A Mr. Torres was in Santiago and Mr. Torres passed Rio Haina and greeted me.

Q You didn't discuss this case?

A I am no lawyer for that case.

After that Mr. Torres turned to Rio Haina and he goes to my office for greeting and that is all.

THE COURT: He goes what?

THE WITNESS: He goes to my office for greeting because he is my friend.

Q This is after you met with Mr. Kennedy?

A After Mr. Kennedy and I and the other lawyer was over there. Two or three times he come. He was working about 200, 100 kilometers fromSanto Domingo right now.

Q Have you spoken to Captain Torres since his deposition about this case?

A No.

MR. MALOOF: No further questions.

THE COURT: Thank you.

(Witness excused.)

MR. DE ORCHIS: I offer in evidence two statements

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taken from Mr. Torres, the pilot, and were identified in connection with his deposition, one statement was taken by Mr. Kennedy and one statement was taken by myself, long before he testified.

Mark those as the next two exhibits.

THE COURT: They are identified in the deposition already in evidence?

MR. DE ORCHIS: Yes.

THE COURT: And they would be Mr. Torres' statements?

MR. DE ORCHIS: Right. The reason I am offering them --

THE COURT: I understand. You said they make no mention of this alleged --

MR. DE ORCHIS: That is right.

(Plaintiff's Exhibits 12A and 12B were received in evidence.)

MR. MALOOF: We may have an objection to the translation on this.

MR.KENNEDY: If the English translation that I thought is the one yesterday was the one being offered, I think it would be better if Mr. De Orchis and I agreed on a proper translation.

MR. DE ORCHIS: We can do it this way: I will

qb

ask Mr. Maloof to stipulate that when he took a statement from Mr. Torres, the statement he took from Mr. Torres did not contain any reference whatsoever to any conversation with Mr. Collie or Mr. Feliz, is that correct?

MR. MALOOF: I wouldn't know. I never took a statement from Mr. Torres.

MR. KENNEDY: I will stipulate it is not in the statement.

MR. MALOOF: All right. I stipulate that in the statement I took from Mr. Torres there is no mention of any conversation with either Mr. Collie or Mr. Feliz. That is the only reason I am offering the statements.

THE COURT: I will accept them and if anybody has any criticism of the translation, he can raise it.

MR.DE ORCHIS: For my next witness, I call Mr. Ganly.

Mr. Ganly is a naval architect, who was called in by the general average people to examine the bottom, and try to separate the damage going on from the refloating damage. He was called in as an expert.

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JQjw 1

E D W A R D F R E D E R I C K G A N L Y ,

called as a witness, being first duly sworn, testified as follows:

THE COURT: I take it there are three relevant damages, one the damage done by getting --

MR. DE ORCHIS: Onto the rocks which we don't claim.

THE COURT: Was there any damage to just getting off the rock before the slideover?

MR. DE ORCHIS: I am not sure about that but all the rest of the damage we claim as refloating damage. Everything that happened after the rope parted we claim is general average.

THE COURT: This witness is distinguishing between the first part and the second part, is that right?

MR. DE ORCHIS: That is right, your Honor.

DIRECT EXAMINATION

BY MR. DE ORCHIS:

Q By whom are you employed?

A Ganly Brigs Incorporated.

Q What is that business?

A Marine surveying and what I say is analytical naval architecture.

We don't design ships but we do naval

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architecture for cases like this.

Q How long have you been a naval architect?

A Since 1936.

Q Were you connected with Sealand in any way or are you?

A No.

Q Were you connected with Despard and Company in any way?

A No.

Q Were you consulted by Despard and Company in connection with the Beauregard general average?

A Yes, I was.

Q Would you tell us what it was that Despard consulted you about?

A They consulted me about the separation between the general average or sacrificial damage on the bottom and the particular average damage which occurred when she first went on the strand.

Q What did you do in the way of investigation?

A The investigation that was done was done at the time of the survey. I met the ship when she arrived at Port Elizabeth. She came in as I recall in the evening and I went on board and while the divers were making an underwater examination prior to her drydocking at Bethlehem

qjw 3 Ganly - direct 243

in Hoboken I made an examination of the engine room to ascertain there was no damage there.

THE COURT: Why did the divers make an underwater examination if the ship was about to drydock?

THE WITNESS: For two reasons, your Honor. First, the owners wanted to get a first-hand knowledge of how serious the bottom damage might be.

THE COURT: To decide whether it needed work?

THE WITNESS: I think it was for operations. They wanted to know whether they could contemplate berthing the ship.

As I recall, the divers'examination showed such a small amount of general damage that they stemmed the ship for the loading berth before she went on drydock.

The second reason for having this examination was to make sure that if any of the bilge keel was hanging that that could be cut off before she went into drydock.

THE COURT: Any of the what?

THE WITNESS: Bilge keel, a flat plate running down the side of the ship that slows down the rolling of the ship at sea.

Q In case that was broken off it would have to be cut off before the ship went into drydock?

A Yes.

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Q Did you observe the ship after it went into drydock?

A Yes, I did.

Q Were you able to look at the bottom of the ship and observe the damage to it?

A Yes, I was.

Q And --

A At that time it became apparent that there were really three separate and distinct patterns of damage on the bottom.

Firstly, there was this damage up forward which was caused by the vessel running onto the beach and among rocks in a forward way. There was damage onto the bottom and on the side plating near the bottom but all of this had longitudinal scarring for and aft showing a forward motion on the ship.

There was then a space on the bottom of the ship that was relatively undamaged. In fact it doesn't appear even in the survey. But aft of thi the bottom had two patterns of damage, one superimposed on the other with a third one which I will mention which does not really matter.

The large damage consisted of athwartship scoring and indentations in the plating which showed that

qjw 5 Ganly - direct 245

the vessel had moved sideways over the bottom. There were also in this places where the bottom was sent up straight as if she had been bouncing as she went along.

Then out near the edges on both the port and starboard side above the bottom and damage which could not be caused by this bumping I have just described, there was damage to the bilge keel which indicated the vessel must have rocked or rolled from side to side while she was on the beach.

Then there were marks but no damage showing horizontal or longitudinal scoring of this damaged plating but this last pattern really didn't show any damage. It just showed the plating had been scraped.

After having made this cursory examination with Mr. Kenric, who was the Salvage Association surveyor representing the hull underwriters of Sealand, of the ship, he and I went up to the captain's office and I spoke with Captain Boehm and I read his report and I am not sure whether I saw the log book or the log abstract but at any rate I spoke with the man.

Sitting on his settee I drew a sketch as he spoke to me to show how the vessel first went aground and how and why she moved from position to the other.

And the damage which we had seen fitted his

qjw 6 Ganly - direct 246

story absolutey. There was never any doubt as to what movement had caused which damage.

I will stop there. I have answered your question.

Q You mentioned the sketch. Would you look at this sketch. Is this the one you are talking about?

A No, that is not. That is a sketch which I sent to Mr. Myerson in response to a letter that he wrote to me and that is drawn from the sketch I made in the captain's office.

I thought that one might be a little clearer. Here is the original sketch and it can be compared.

In essence they are exactly the same. This is the original sketch I made in the captain's office.

THE COURT: This is what you say is a finer copy of this?

THE WITNESS: Yes, sir, I thought it might be more understandable.

THE COURT: Are you offering them?

MR. DE ORCHIS: I will offer them in evidence.

THE COURT: Offer this with a number and this with a letter A.

(Plaintiff's Exhibits 13 and 13-A marked for identification)

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Q After you completed your survey of the damage sustained by the ship, did you prepare a report for Sealand?

A Yes, I did. But I think there is something that I should say because it's very pertinent.

After we saw this damage --

MR. MALOOF: Objection. He has to be answering questions and not narrative.

Q After you saw the three distinct types of damage what occurred after that?

A Then I called Mr. Myerson on the telephone because from experience I know that when there is a great deal of damage which might come under the heading of general average the cargo people and other people who have an interest very often appoint their own surveyor, general average surveyor.

I urged that a general average surveyor be appointed in this case.

Q Was a general average surveyor appointed?

A No, no general average surveyor was appointed or appeared.

Q Was any other surveyos other than you ever given an opportunity to examine the ship?

THE COURT: How would he know?

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THE WITNESS: I can speak only of the classification surveyor and the United States Coast Guard. They were both present, of course.

Q Did you issue a survey report of the damage sustained by the vessel?

A Yes, I did.

Q I show you this document and ask you whether that is the survey report?

A Yes, this looks like a copy of my survey report, yes, it's true.

MR. DE ORCHIS: I offer this in evidence.

MR. MALOOF: Can we ask why you are offering that in evidence?

MR. DE ORCHIS: There are hundreds of figures in here plate by plate that should the damage. I can ask him question by question.

MR. MALOOF: I wanted to know why. I would have no objection.

MR. DE ORCHIS: It's just to save time.

MR. MALOOF: That is the reason it's offered?

MR. DE ORCHIS: Yes, except for the first page it's all figures.

THE COURT: There being no objection it's received.

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(Plaintiff's Exhibit 14 received in evidence)

Q Mr. Ganly, do you know whether surveyors -- whether the cargo interests, the cargo underwriters were invited to attend and survey the ship?

A Mr. Myerson said to me --

MR. MALOOF: Objection to hearsay.

MR. DE ORCHIS: He knows whether he was invited or not.

THE COURT: Do you know whether you were invited --

MR. MALOOF: I object.

THE COURT: Do you know whether you were invited?

MR. MALOOF: No.

THE COURT: Does Mr. Kennedy know?

MR. KENNEDY: I don't know.

THE COURT: All right, you can call Mr. Myerson in due time.

Q Did any other surveyor or did you consult with any other surveyor or did any other surveyor consult with you about these different types of damage that appeared on the bottom?

A Only Mr. Kenrick and I at the time.

qjw 10 Ganly - direct 250

Q Who was Mr. Kenrick?

A He was the Salvage Association surveyor representing the underwriters of the ship?

THE COURT: Who did you represent?

THE WITNESS: I represented the owners directly.

Q Did you discuss these different types of damage with Mr. Kenrick?

A Yes, we did, plate by plate.

Q Did he agree these were different types of damage?

A Yes, he did.

Q Did you receive from Mr. Myerson after you issued this report which we have just marked in evidence any additional inquiries, any additional consultation with them?

A Yes, I did.

Q What brought that about?

A Well, I can only surmise as to what brought it about. I presume there were questions that came up while he was getting to prepare his adjustment and he asked me for various separations of costs and types of damage.

Q Did you furnish those?

A Yes, I did. I wrote him several letters.

Q Was there any joint survey besides this survey report?

A No, that was the joint survey between the owners and the owners' underwriters.

Q Who represented the owners in this survey?

A I did.

Q Who represented the owners' underwriters?

A Mr. Kenrick.

Q I show you this exchange of correspondence with the general average adjusters and would you please look through it to see if that is the correspondence which occurred after you issued your report?

MR. MALOOF: We do not object to the two sketches of Mr. Ganly.

THE COURT: Received.

(Plaintiff's Exhibits 13 and 13-A received in evidence)

Q Mr. Ganly, that is the correspondence that you exchanged with Despard and Company?

A That is right. This is the correspondence between Despard and me, yes, sir.

Q Without going through the whole correspondence letter by letter, was the gist of the correspondence that you were being asked by Despard and Company to make it clear

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qjw 12 Ganly - direct

what was particular average and what was general average in this damage?

A That is right.

Q Did you finally give them your opinion as to what was particular average and what was general average?

A Yes, I did.

Q Is that contained, the final conclusion, is that contained in any one of those letters?

A No, sir, it's in the report. All of these letters merely substantiate what I had already decided in the report.

Q Would you then tell the Court step by step as to the damage sustained by the ship when she went on the strand, the damage you described to the bow of the ship, was that damage in your opinion general average or particular average?

A That damage was particular average. It was caused by a particular accident going on the beach.

Q You mentioned that you could see longitudinal scoring on each side of the ship.

Can you tell us how high up those scratches were on the bow?

A They extended up as high as six feet and I think they are in the report as well. I haven't read the

report but I think it's in there.

Q Would that indicate anything about how deeply the ship penetrated into the rocks?

MR. MALOOF: I think Mr. DeOrchis is asking a lot of leading questions of his expert witness.

THE COURT: Would it indicate anything, yes or no?

THE WITNESS: Yes.

THE COURT: What does it indicate?

THE WITNESS: That the vessel was well and truly with her nose in among the rocks. She was six feet deep in the rocks.

Q Was there any indication on the port side of the ship bow that she had come in contact with another ship?

A Yes, there was contact damage up high on the port bow which the captain said resulted from striking a wrecked tanker which was already on the breakwater and M accepted that and no on has argued it.

Q As to the damage which occurred and it looked like the ship had moved sideways, the scoring sideways, in your opinion was that general average or particular average?

A That was general average.

qjw 14 Ganly -direct 254

Q Why?

A The reason comes back to this sketch that I made and there is a whole reason for my speaking with the captain was to find out what did occur to the ship that resulted in these damages.

Of great importance to me when I spoke with the captain was the fact that he had gone aground and then did what a reasonably prudent master would do, try to come off the same way he went on, through the same track.

He got a tugboat and worked with the tugboat and his own engines and actually freed the ship and she was moving and she would have come off, in my judgment, and this is all my judgment, she would have come safely off had the tow line not broken.

Therefore, it seemed to me and still does that whatever followed after the breakage of that tow line was a consequence of unsuccessful efforts to refloat.

Q You mentioned a third type of damage and that is the pushing up indentations on the bottom of the ship. That classification of damage, was that in your opinion particular average or general average?

A That was general average because the bouncing occurred not on the place of first stranding, and I asked the captain about this because he mentioned to me he had a

qjw 15 Ganly - direct

10 or 15 foot swell and I asked whether he had bounced on the bottom at his first place and he had not.

But when he was backing off with his engines and tugboats he then pounded so therefore I put the poudning damage to general average.

Q Was there any other damage than the three that we have mentioned?

A Yes, there was another damage which resulted from rocking the boat or rolling the boat from side to side while they were raising and lowering the gantry arms as Captain Mello described, walking the ship out of her second stranding place.

Q That is the damage you described to the port and starboard keels?

A That is right.

Q Which would be above the bottom?

A Yes.

Q But would only occur if the ship was rolling?

A Yes, sir.

Q Incidentally, is it rolling or rocking?

A In this instance it is the same.

Q Did the question come up about that with Mr. Myerson?

A Yes, it did. I called it rolling which I still

qjw 16 Ganly - direct

do but he thought it might be better for the insurance people if I changed the phraseology from rolling to rocking.

Q You rewrote the letter and used rocking instead of rolling but this is what you are talking about, the movement of the ship?

A Yes.

Q We have talked only about the damage to the shell of the ship or the hull of the ship.

Was there any other damage that resulted from this operation? I am talking about internally now.

A That is what I am thinking of too. We did have sand in the stern tube and we had sand in all of the salt water systems which resulted from sucking in sand and water while they were working the engines on the beach.

We also had an overheated stern element in the low pressure turbine. We had crane damage. We had a winch which had to be overhauled.

There was a warping winch back aft that they had used that had some problems.

Q What is a warping winch?

A That is a two-cylinder steam engine with a gypsy on the end and they put a rope and you exert a long pull on the line.

Q These items which are other than the shell

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qjw 17 Ganly - direct

plating damage, are they taken up in your report?

A Yes, they are.

Q As to each one have you assigned them general average or particular average?

A Yes, sir.

MR. DE ORCHIS: I have no further questions.

THE COURT: Tell me about this pounding. You say the captain told you it didn't start pounding until after he started to pull out.

THE WITNESS: When he started to come back this way. He made stern way as well as coming to port. His stern has come out. That was under the influence of his tugboat and his own engines.

After the tug line broke he still continued with his own engines because he was moving and he had hoped all the time to eventually come free but he never quite did so he had to stop in this position.

This bouncing took place between the first position and the second.

THE COURT: It didn't take place in the first position?

THE WITNESS: That is right.

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CROSS EXAMINATION

BY MR. MALOOF:

Q Did you read Captain Boehm's deposition?

A Yes, sir.

Q Did you read the part where he says that it might have bounced in Position A and not been in the log book because he was a pretty busy man at that time?

A Yes, sir, I read that.

Q Did you take that into consideration in making your opinion?

A No. My opinion was made at the time of the survey, Mr. Maloof.

Q Your opinion is being made here today also.

A Yes, all right.

Q Have you considered it in your testimony today, sir?

A Yes, I have.

Q And you give it no weight?

A I give it no weight because of this: The question in his deposition was could she have been bouncing and not entered in the log book and the master said yes, because I was doing a lot of things and a busy man.

The question was asked could it have been and not did it. The captain said she did not bounce and I believe

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qjw 19 Ganly - cross

she did not bounce.

Q Didn't it say could have because it wasn't in the log book?

A It's an interpretation perhaps.

Q You weren't at the deposition?

A No, sir.

Q And you interpreted this testimony most favorably for your opinion and for your client, didn't you?

A It works out that way but that doesn't make a difference to me. I very often give a client an answer he doesn't like.

Q So do I but on this occasion did you change any of your language at the request of Mr. Myerson?

A Yes, I did in this letter.

Q So this is not one of the occasions where you gave him something he didn't like, is it?

A Oh, I think the connotation --

Q Yes or no.

THE COURT: Yes. Don't worry about connotations.

MR. MALOOF: I wanted it in the record.

Q I show you a photograph and ask you if you can identify that, sir.

A It looks like a bow of a ship.

qjw 20 Ganly - cross

Q A ship?

A Yes.

Q A ship?

A Yes. This is a general question, a general answer.

Q Can you identify the ship?

A I can't identify the ship by name but I would say it's an American ship from the construction. It could be a C-2 or it could be a C-1.

MR. MALOOF: Identification, please.

(Defendants' Exhibit G received in evidence)

Q Showing you again Defendant Exhibit G, you don't know what ship that is, I take it?

A You can't identify the ship from this photograph but if we don't want to fence it's probably the Beauregard. It could be the Beauregard.

Q You are not sure?

A No, not from that picture. Nobody can be sure.

THE COURT: Never mind about anybody else.

THE WITNESS: It can be one of any similar ships, your Honor.

Q Mr. DeOrchis was talking about an exchange of

qjw 21 Ganly - cross

correspondence between you and Mr. Myerson. You reported to Mr. Myerson didn't you by way of reporting to the shipowner, you dealt with Mr. Myerson, is that true?

A At times I did.

Q Most of the time?

A That is difficult to sya.

Q Was it Mr. Myerson who engaged you to make this survey?

A No, sir.

Q Who did?

A Mr. William Pyle, superintendent for Sealand.

Q I show you an exchange of correspondence between you and Mr. Myerson and ask you if this is the exchange Mr. DeOrchis was talking about which he did offer in evidence.

THE COURT: The same thing he had in his hand, right?

MR. MALOOF: These are my copies. I don't know if Mr. DeOrchis showed him the same ones or not.

Would you perhaps compare them.

THE COURT: Show them to Mr. DeOrchis and ask him if they are the same ones.

MR. MALOOF: Is this the correspondence you referred to without putting it in evidence?

MR. DE ORCHIS: Yes.

MR. MALOOF: Make a comparison for the Judge.

Does this include all the ones you were talking about?

I believe you handed me this photograph before this trial which is Defendant Exhibit G. That is a picture of the Beauregard bow, isn't it?

MR. DE ORCHIS: I assume it is.

MR. MALOOF: I want a stipulation that it is. It was given to me as a picture of the bow of the Beauregard.

MR. DE ORCHIS: I have it in color and you have it in black and white. These are all the Beauregard.

MR. MALOOF: May I see the color pictures please. Thank you.

I offer in evidence this exchange of correspondence between Mr. Myerson and Mr. Ganly. IT consists of six letters.

THE COURT: I take it there is no objection?

MR. DE ORCHIS: No objection.

THE COURT: They will be taken as one exhibit.

(Defendant Exhibit H received in evidence)

Q Mr. Ganly, the top letter in Defendant Exhibit

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is a letter apparently from you to Mr. Myerson, is that true?

A Yes.

Q Is there something unusual in connection with that letter? Not about the language in it.

A Something unusual?

Q Yes, the big X across the front page.

A Yes.

Q Who made that X, do you know?

A I don't know. After I mail a letter, I don't know.

Q It's a letter you sent to Mr. Myerson?

A Right.

Q And Mr. Myerson called you and asked you to change the language?

A Yes.

Q Can we assume Mr. Myerson put a pencil --

THE COURT: We can't assume that. How does he know?

Q When your client called you up and asked you to survey the ship, did he give you his idea of what would be proper general average or what would not?

A No, sir.

Q He did discuss the facts, didn't he?

qjw 24 Ganly - cross 264

A No, sir.

Q Mr. Ganly, you have given it as your opinion that all of the damage caused to this ship as it moved from Position A to Position B is general average.

A That is right, everything that happened after the tow line broke is general average.

THH COURT: I take it nothing happened before the tow line broke?

THE WITNESS: That is right, there is no refloating damage before the tow line broke.

Q Are you a general average adjuster?

A No, sir.

Q In other cases do you give your opinion on which damage is general average and which isn't?

A Yes, sir.

Q Is this your prerogative as a surveyor?

A Yes, it is. Nobody else can do it.

Q The general average adjuster does not do it?

A He can't go down to the drydock and make the same determinations we made and we have to make our decision right then and there as we examine our damage.

Q When he puts it in his general average statement that a certain average is general average he is relying on you or some other expert whom he may call and

26a

qjw 25 Ganly - cross

submit the facts to just as your Honor is going to do the same thing.

Q If the Beauregard, if nothing were done to her in Position A would it have been likely to still go further

26b

qjw 26 Ganly - cross

on the rocks to port, that is her stern to port and would your conclusion have changed that it was general average?

A That is a question I can't answer yes or no because I don't agree with the premise.

THE COURT: Why don't you agree with the premise?

THE WITNESS: No vessel goes on the rocks and does nothing. This is what I don't agree with.

THE COURT: What do you mean it goes on the rocks and does nothing?

THE WITNESS: You don't stay there and wait for yourself to be driven into a worse position. If there were no help at all available for this vessel except herself she still wasn't helpless. She could have held her position by going full ahead with a left rudder and that would have helped to hold her.

It's wrong to say if nothing had been done she would have gone to port. Of course she would but nobody would lay there and do nothing.

JQjw 1 Ganly - cross 267

Q Nothing is impossible if I say if. I ask you to assume nothing was done.

A I will assume nothing whatever is done and she just lays there. She will eventually go to port. She has to because that is the prevailing wind and weather, but how long it takes, nobody can say.

Q That would be likely to happen?

A Yes. I won't agree on a time frame.

Q Time is important?

A Yes.

Q But it would probably go over.

A I would say you can be stronger than that. You say if nothing is done she will eventually wind up alongside the other tanker.

Q You seem to say it would have inevitably gone over?

A Eventually but this isn't practical.

THE COURT: You say eventually. Assuming again that everybody died at that moment therefore nothing was done.

THE WITNESS: That is right. We live in the real world, people don't act like that.

THE COURT: When you get into court the real world does not follow.

qjw 2 Ganly - cross

Just assume that at that moment everybody on the ship died so nobody could do anything, how long in your judgment would it have taken for the ship to go over to the position?

MR. DE ORCHIS: Assuming the weather didn't change.

THE WITNESS: You have 10 or 15 foot swells. Before she got up against the tanker she may very well have holed herself and she may well have broken. She could have very well broken in two because she had a lot of water under the stern and the forward half of her was supported. She might not have entirely gotten over against the tanker. Maybe she might have broken beforehand or flooded.

THE COURT: In the real world you say the decision wasn't between trying to pull her off and just doing nothing but between trying to pull her off and drive her in further to hold her?

THE WITNESS: Yes.

THE COURT: That was the mariner's decision that had to be made?

THE WITNESS: That is right. I think he made the right one.

THE COURT: I understand.

qjw 3 Ganly - cross

The decision was not as I supposed yesterday between doing nothing and pulling off but the decision was between pulling off and taking affirmative action to hold her in?

THE WITNESS: Yes, sir. When you say it was inevitable the vessel was going to go over to the other position, that means inevitable inspite of anything you can do.

Q When you are using the power of the ship to hold her bow into the rocks have you taken her out of peril?

A No, but you are stablizing the position.

Q But that can't be a peril situation.

A No. Not a peril situation.

THE COURT: Until better help arrives?

THE WITNESS: Yes.

Q Do you know there were tugs only two hours away?

A I thought there were tugs closer than that.

Q Let's assume they were closer. How close do you assume they were?

A There was a tug right there and she hooked up in 10, 15 minutes.

Q I mean other tugs besides the first one. The first one was there in ten minutes. Do you know that

qjw 4 Ganly - cross

there were other tugs in the Dominican Republic about two hours away?

A No, sir.

THE COURT: We have no evidence of that that I heard.

Q Assuming a tug was there within two hours and the record will show that, your Honor, the RB 13 or 12, there is some dispute about the numbers, was there within two hours, would it have been reasonable to do what you say could have been done to hold the bow into the rocks for two hours until another tug could have come and then they would have two tugs in case a line broke, wouldn't that be more safe?

MR. DE ORCHIS: If your Honor please, I think this is entirely irrelevant to the issue in this case because he is talking about management and navigation of the vessel. Those are decisions the master would have made and errors in navigation and management is what the Jason Clause is about.

THE COURT: It seems to cast some light on the problem.

MR. MALOOF: I am discussing his point about holding the bow on the rocks and whether anybody would do that. Why could not that be done for a couple of hours

and you would have two tugs.

A It could have but when you have a ship on the beach the first thing you want to do is try to get off if you have some available equipment that will give you a chance because once a vessel is on the beach the situation never gets better it only gets worse.

Therefore you want to come off as quickly as you can. This master did the right thing. He nearly made it. If that line had not broken I think he would have. I felt it then and I feel it now.

Q Is it foreseeable of the results of the line breaking important in determining whether this damage we are talking about is general average?

A Foreseeable results of the line breaking, is that important?

Well, that is the sort of thing which is, what shall I say, a judgment decision. The master has to say to himself I am going to try to get out of this but if I fail what might happen and you are asking me now to sit inside the master's mind.

Q I am asking you how you determined it was general average. Did you consider foreseeability?

A No, that is not in it at all.

Q Is intent important?

A Yes, it is and the intent was to get her off and if you are unsuccessful in getting her off and you

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qjw 7 Ganly - cross 273

damage the ship in this attempt it's general average.

This isn't the first one I have had like this. I have had a number of cases like this.

Q What was the horsepower of that first one?

A I heard she was 500 horses.

Q That is in the record?

A Yes.

Q What was the size of the hawser which was used?

A That I don't know.

Q What pulling power would a 500 horsepower tug have?

A In smooth water her bollard would be a minimum of about five tons.

Q What is bollard pull?

A That is a static pull in calm water on a steady strain but that your Honor is not what is important when a tug is working.

MR. MALOOF: I object.

THE COURT: No, don't object.

THE WITNESS: That is not important when you are tal-ing about working a tug in a sea way. What is important is keeping the line taut because even a small vessel can on a surge exert far more than her bollard pull

on a line.

THE COURT: What does bollard mean?

THE WITNESS: That is what they use to attach -- they still attach a line to a bollard. It's like a mooring post.

Q Did you read the testimony of Mr. Torres and Captain Mello?

A No, sir.

Q Let's assume they testified that the line was kept taut from the time they took up the initial slack until the time it broken.

Then in that case and we can still assume it swells, weren't they, what -- this is in Position A -- what then would be the maximum pulling power of that tug?

A It's impossible to say.

Q Roughly, can you make an estimate?

A No, she is going up one side of the wave and down the next.

When she is going down she exerts far more pull than going up. There has to be slack in the line.

Q You don't know the breaking power of the rope, do you, in new condition?

A I don't know the size of the rope.

THE COURT: Nothing about the rope?

Q Have you ever gone to sea?

A Only as a work away.

Q What is a work away, a stowaway?

A Not quite although you would be better off as a stowaway.

I was a wiper in the engine room of Black Bridge Lines for a six-week trip to Europe and back and I got a penny.

THE COURT: But you got the trip.

THE WITNESS: Yes.

Q Is that the extent of your sea experience?

A Yes, signed on. I have made various short trips on ships going from salvage place to a shipyard and that sort of thing.

Q Not as a seaman?

A No, sir.

Q You were a seaman for six weeks, a wiper?

A Yes, in the engine room.

Q Did you at one time render an opinion to your client that this ship would have remained firmly fixed if nothing had been done?

A I don't recall if nothing had been done but I agree she should have stayed there and I did, yes.

Q She would not have moved?

A That is right. I still feel so and I have herqd the testimony from the beginning of the trial.

THE COURT: What do you still feel?

THE WITNESS: She would have stayed there.

THE COURT: If she had been properly handled?

THE WITNESS: Yes. I know now the weather moderated so it's more likely she would have stayed there. When I talked to the captain all I knew was the 10, 15 foot swell. We have to make up our opinion at the time. This is what, eight years later.

Q Go back to the rope for one more question. Assume that it was one year old, would you expect it to break?

THE COURT: He told you he knows nothing about ropes. Get on to something else.

A I can say something to that. I don't mean to contradict your Honor. I do approvals of towages at sea and

qjw 14 Ganly - cross

I have been on salvage jobs and I have actually seen ropes break.

It isn't only the strength of the rope that matters it's how it leads. And what sort of surging pull is put on it.

Whether the fairleads it goes through are smooth or whether they also are rough and all these things govern whether a rope breaks.

Q You said divers went down to see the bottom of the ship in New Jersey before she went on drydock.

A Yes.

Q Did they render a report?

A I couldn't say. They weren't working for me. I heard an oral report. Whether they made a written report I would not know.

Q You said they reported there was very little damage.

A That is right.

Q Can you explain how that could be and you saw so much damage?

A Yes, I can. I have worked with divers and they work under a most difficult condition. Some of the work they do is fantastic but they can also make mistakes because a man is underneath the bottom of the ship which is

70 feet wide. In Port Elizabeth which has water he can't see more than a foot or so.

He is looking at the ceiling of the room foot by foot. He can't give you an overall picture.

THE COURT: He can tell you where there is a hole?

THE WITNESS: Yes.

Q Does he take a light with him?

A Yes.

Q Does he go up close to the skin of the ship and look at it?

A He would have to do that to see it. Because of the water.

Q Would he see a deep gouge?

A Yes, if he happened to see it. If he happened to pass it he would.

Q Could he see a deep gouge?

THE COURT: Are you trying to contradict this witness' testimony by hearsay statements of the divers?

MR. MALOOF: I will withdraw that line of questioning, your Honor. It's just we never got a copy of any report and I want to know if there was one..

THE COURT: He doesn't know there was one.

Q You were never in Rio Haina to see the

qjw 16 Ganly - cross 282

Beauregard at the actual spot, were you?

A That is right.

Q So your opinion then is based on your view of the bottom of the ship in drydock plus a talk with Captain Boehm?

A Yes.

Q Anything else?

A No.

Q What else did you consider?

A When I made my decision in the shipyard I had spoken with Captain Boehm and I saw either his report or a log abstract, some papers I read at the time. Mr. Kenrick and the captain and I had a three-way dissertation about this conversation about this.

qb-1 Ganly-cross 283

Q Did Mr. Kenrick come to the same opinion you did on the refloating damage?

A Yes, sir.

Q Did he make a survey report?

A I presume he did.

Q You didn't see it?

A There was no reason I should, sir.

Q Do you know Mr. Kenrick?

A Yes.

Q If he made a report ordinarily would he put his opinion in on that point?

A Provided his principals wanted him to. I am not sure what their rules and regulations are in salvage

associations. I can only say there was no difference of opinion between Mr. Kenrick and me at the survey.

THE COURT: At the time?

THE WITNESS: Right.

THE COURT: He may have changed his mind at the time he got out his report as far as you know?

THE WITNESS: I happen to know he didn't.

Q The only things you considered in rendering your opinion were what the bottom of the ship looked like and the talk with Mr. Boehm and seeing the report or the logbook.

A And my experience.

Q Andyour experience overlaying that.

THE COURT: Your experience applied to these matters?

THE WITNESS: Yes.

Q You did not consider the testimony or the report or statement of Captain Torres, the pilot?

A No,s ir.

Q Or Mr. Mello, Sealand's Caribbean superintendent?

A No.

Q Or Mr. Collie's memo?

A No.

Q Did you see those papers?

A No, sir, I made up my mind on May 14 or 15th when the ship came to drydock and I still am of the same opinion. I see no reason to change.

Q And since then you have read other papers in

the file, havey ou not?

A Yes, I have read other things.

Q YOu have seen Mr. Collie's memo?

A I don't honestly remember if I have or not. I haven't made any conscientious effort to remember.

Q Have you read Mr. Mello's deposition?

A No, I heard his testimony.

Q Mr. Ganly, I show you Defendants' Exhibit G. Are we now satisfied that this is a picture of the Beauregard?

THE COURT: It is stipulated.

A It is stipulated as being the Beauregard, correct.

Q When you saw this, this was part of your reason for your opinion?

A I saw the ship, not the photograph.

Q Is there a difference?

A Making one's opinion based on a black and white photograph is not nearly so good as making one's opinion based on the examination of the ship.

Q How high is the ship from the keel to the weather deck?

A I don't have that figure in my mind.

Q Do you have papers where you can refresh your recollection?

A I don't have the characteristics of the ship. I would say her depth was probably somewhere in the region of 38, 40 feet.

Q You know what a C-2 is?

A Yes, sir. But one does not remember all the characteristics.

qb-4 Ganly-cross

Q How long was the ship?

A 435, 450 feet beteen perpendiculars.

Q You testified the markings between the six-foot water line convinced you that she was wedged six out of four solid differences, that it wouldn't move?

A I don't carry how tall the ship is, she is six feet in the rock.

Q Is it possible, Mr.Ganly, and neither one of us will ever know this, is it possible she came into the rocks and bounced back out a little bit?

A Anything is possible.

THE COURT: I have a rule that any question that is put to a witness, is it possible, must be answered yes, unless the witness is the Almighty.

Q Your answer then must be yes, it is possible this ship went in --

THE COURT: It is possible the ship went in, bounced 3000 feet in the air and flew out but not likely.

MR. MALOOF: I disagree.

THE COURT: If the Almighty wants to produce that result he can.

MR. MALOOF: I disagree.

THE COURT: Ask him whether it is reasonably proper.

Q Could it have happened?

qb-5 Ganly-cross 287

THE COURT: In reasonable experience.

THE WITNESS: I will answer your Honor's question.

I will say no because there was no evidence of it.

Q What evidence would it have left?

A It wouldhave left a scoring which would, if I may refer to the picture, you see this score was made as the vessel went in. If she went in and came back out again,you would find the score went in, stopped and that would be the beginning point of a score going the other way.

Q Every movement of the ship over rocks leaves a mark?

A Yes, sometimes it is paint, sometimes it is barnacles, and sometimes the shell plating. You can't rub a steel ship with a coating of paint on rocks without marks.

Q Therefore where there are no marks on the ship's bow she didn't touch the rocks?

A Right. But here if it says "FP1,"that is a heavy mark,it is rust.

Q That is not the six-foot water line?

A That is right.

Q What line is that?

qb-6 Ganly-cross

A That is down about the three-foot. She comes up to about here.

Q Put an arrow on the white part of the photograph where you say the three-foot water line is.

Where the arrow is is where the heavy marking is?

A Yes.

Q From which we conclude that is where the heavy wedging was, right?

A Yes, sir. Not that the other wedging wasn't snug, that is heavier.

Q I think you testified that the captain told you that he did free the ship.

A She was coming free, put it that way. I don't think he was ever clearly off the ground.

Q He didn't say he did free the ship?

A He was on the verge. It was touch and go.

Q She stayed always on the rocks?

A I think he was always in touch with the ground. Although it wouldn't change the fact it was one continuing casualty because he was never out of peril.

Q YOu have testified that this ship could have been held on the breakwater by going ahead full ahead, and with left full rudder.

qb-7 Ganly-cross 289

Please tell us how and why that would be true?

A The going full ahead would keep her nose into the beach and the left rudder tries to push her stern up against the sea, which is coming from her starboard quarter.

Q That acts then like an anchor at that stage, is that true?

A Not like an anchor, it is a dynamic force.

THE COURT: How does the rudder help when the ship isn't moving?

THE WITNESS: When you are going ahead the propeller pushes the water back. That is what makes the ship go. The fast running water coming by the rudder is what gives the rudder its force. With a left rudder the stern of the ship is forced over to starboard.

THE COURT: Even if the ship isn't moving the propellers creat a current which operate against the rudder?

THE WITNESS: Yes, sir.

Q Mr.Ganly, do you know what the drafts of the ship were in position?

A Yes, it is on my sketch there.

Q Would you look atyour sketch and tell the Court what the drafts were.

A 184 forward and 2504 aft.

Q So that the stern, if she hadn't been stranded,

qb-8 Ganly-cross 290

was deeper in the water than the bow?

A Yes.

Q And in Position A with the bow up on the rocks the stern could be even deeper in the water, right?

A Yes, undoubtedly it was.

Q In your opinion would these 15-foot swells have affected the stern of the ship?

A Yes, they would.

Q Would they have made the ship rise and fall?

A I expect they would.

Q Would there be some effect therefore on the bow?

A Yes,there would be a little up and down motion on her. Yes, there could be.

Q When you made your opinion, Mr. Ganly, did you know the weather conditions at that time?

A Only as they appear on the sketch here. I think I have heavy swell 10 to 15 feet.

Q The swells were 10 to 15 feet?

A Yes.

Q How about wind and current?

A I am looking to see whether I have anything on the wind here on the sketch. There is nothing here of wind. I don't see anything.

Q Shall we assume one way or the other whether

qb-9 Ganly-cross 291

or not you considered the weather?

A Whether I considered the weather?

Q Did you consider what the weather was?

A The wind?

Q Start with the wind.

A Evidently I didn't think the wind was a material factor.

Q If you had read depositions of any witnesses who testified that they feared that the wind and the sea would force the ship to port, would you have considered it in your opinion then?

A I would certainly have takennote of what they thought and what they saw, but having heard a lot of this since this trial began and assuming these things that you say are true about everyone fearing that she was going to change, I reexamined this in my mind and I am still of the same opinion that I came to when we were on the drydock. I wouldn't change a bit.

Q Mr. Ganly, you did read the logbook in this case?

A I cannot say that I did. As I said earlier, I either saw the logbook at the time or I saw the captain's extract of the log. I am not sure which.

Q Let's assume that the logbook shows that after

qb-10 Ganly-cross 292

the line broke there was no significant immediate movement, but the same tug then was ordered to the port quarter to push to keep it from going up on the rocks.

And that actually she didn't end up in Position B -- it is a little unsure in the log -- for tw, four hours, and noticed there the next morning at 0600, does that have any effect?

A This I knew of, the captain told me.

Q Just the way I told you?

A I can't say that he said it like you did.

Q Roughly what I said?

A What you say to me is no surprise.

Q That she di dnot go right over to her Position B, did she?

A That is right, it was a slow, torturous thing. He was backing and filling and trying to get off.

Q I assume that yu also know that before the first tug arrived, I believe it was the captain's testimony, that they were using the ship's engins full astern.

A That could be. Whatever the logbook says I knew.

Q If it isin the logbook you knew it?

A Yes.

Q And that this did move the bow of the ship?

A Yes. She was a little bit free.

qb-11 Ganly-cross 293

Q Just from the use of the ship's engines?

A Yes.

Q In view of the testimony of the eye witnesses, more of which you have learned sitting in this trial for two days, are you quite certain that if the engines had been put on full forward with the rudder full left, she would have been all right, she wouldn't have moved?

A Yes, I think so.

THE COURT: I take it you don't think that conclusion is necessary to your opinion.

THE WITNESS: Not really, but legally now I realize it is.

Q Would you explain to me legally.

A From the last two days you professional people have beena rguing what the law is. I am a practical person and I don't deal with what the law is, but I know what general average is, and what sacrificial damage is.

THE COURT: Never mind about the law.

Based on your opinion at the time you made it, this conclusion was not relevant to your opinion?

THE WITNESS: What was relevant to me at the time was the fact she could have stayed where she was and she never would have wound up where she did if she wouldn't have tried to refloat her and she wouldn't have

wound up where she did if the line hadn't broken.

I went step by step.

THE COURT: Then it was relevant to your thought if she stayed where she was.

THE WITNESS: It didn't occur to me in that context.

MR. MALOOF: No further questions of this witness, your Honor.

jqbr Ganly-redirect 295

REDIRECT EXAMINATION

BY MR. De ORCHIS:

Q Just a couple of questions about this line. When a ship goes full astern is it true her stern will go to port, will go to the left?

A Yes, this particular ship does, that is right.

Q So that as the ship is struggling to try to get off --

MR. MALOOF: These leading questions are very inappropriate. I object to them.

THE COURT: Overruled.

Q If she stuck by her bow and she is trying with her own engines to get off will that cause her to go or would that be oneof the things that might cause her to go to the left?

A It would, yes.

THE COURT: Why is that?

THE WITNESS: It is the right-handed propeller and when you go astern with the right-handed propeller you go to the left and reverse the rotation and the stern tends to go to the left.

Q Assuming that, assuming that when this tugboat with the line is pulling on the ship, the tugboat was pulling from the starboard quarter of the ship, right?

jqbr Ganly-redirect 296

A Yes,sir.

Q So that the tugboat is going not directly back of the ship but slightly off towards where the weather is coming from.

A Yes.

Q And the ship when it is going astern with her propeller it is trying to go to the left naturally and the weather is pushing it to the left, the seas, the swells we know about and the wind is pushing her to the left, assuming that and listen to the testimony of their witness, the tugboat captain on page 38 "How long did you pull on the line before it parted?

"A Around ten minutes on the pulling and it was tight.

"Q During the time that you were pulling did the direction of the ship remain the same?

"A During the time we were pulling the ship moved to the east."

Assuming that is so, that the tugboat was able to actually move the stern of the ship to the east when everything was pushing her the other way, can you give us any opinion as to whether that line was in reasonably good condition before they started to use it? If he was able to accomplish that feat?

A It would appear to me so, yes.

MR. De ORCHIS: Thank you.

RECROSS EXAMINATION

BY MR. De ORCHIS:

Q Whether or not the ship would go to port with full astern, doesn't that depend on rudder position?

A No, that is a characteristic of going astern.

Q Your stern always goes to port regardless of rudder position?

A What I meant was that tendency to go to port is independent of the rudder so if you want to back to starboard you have to counteract that.

Q It can be done, can't it?

A Yes, it can but, you see, another problem with going astern is you don't get the same propeller racing past the rudder as when you are going ahead and secondly the rudder is designed for its greatest effect with forward speed so the rudder is ineffective when you are going astern.

Q Is it also a normal thing for the stern to back into the wind?

A That depends upon the sail area of a ship. Some ships will lie stern to the wind and some ships will go about to the wind.

Q What relationship does the sail area have to that?

jqbr Ganly-recross 298

A It depends where the center of effort is longitudinally. It depends on the relationship between the center effort and the center of lateral resistance.

Q Do you know these things on the Beauregard?

A No, sir.

MR. MALOOF: No further questions.

(Witness excused.)

MR. De ORCHIS: If your Honor please, I have no more direct witnesses on my direct case, my prima facie case. I do have some additional documents I would like to put in. I would like to do that after lunch if you can break now so I can do my housekeeping to get the documents together. There are no more witnesses except rebuttal.

THE COURT: We will resume at 1:30 then.

(Luncheon recess.)

H A R R Y W . R E I N E K E, JR., called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MALOOF:

Q Will you tell the Court, Mr. Reineke, where you live?

A I live at 6001 Dover Place, New Orleans, Louisiana.

Q What do you do for a living?

A I am a consulting naval architect and marine engineer.

Q How long haveyou been in that capacity?

A I have had my own firm since 1958.

Q Where were you educated?

A University of Michigan. I graduated from the University of Michigan in 1948 with a degree of Naval Architecture and Marine Engineer.

Q Since that time have you been in the practice of naval architecture?

A Solely I worked for Humble Oil Company for four and a half years in the offshore oil exploration and exploitation end of the drilling business. I was chief engineer and general superintendent of Bayside Construction Company in Morgan City from 1952 through 1954 where we were

Q Did I on one occasion show you some documents involving the S.S. Beauregard and involving her stranding at Rio Haina on May 5, 1967 and ask you to study those documents?

Q Mr. Reineke, did you hear the testimony in this case from Mr. Ganly?

A Yes, sir.

Q That he had an option or the captain had an option of keeping this ship on the rocks by using power full forward, did you hear that?

A Yes, sir, I did.

Q Have you also learned from sitting in this trial from Mr. Ganly took I believe that this ship was damaged because sand had entered the cooling system and the stern bearing?

jqbr Reineke-direct 320

A Yes, this is correct.

Q Would would have been the effect of running that engine for any length of time with sand entering those portions of the ship?

A Well, you are going to obviate your coolint system and once you don't have a cooling system your plant has to shut down.

Q Then the ship would be without power?

A That is correct because youdon't have cooling water for your main condenser. You can't condense your steam and put your water back in your boiler. Eventually you run out of water.

Q What danger would that present to the ship in position A, the first position?

A Run her full ahead?

Q Until shegoes dead.

A Then you have a dead ship on your hands.

THE COURT: How long would it take for it to go dead?

THE WITNESS: I can't tell you. It would have gone dead ultimately because they had problems with sand in the stern bearing and sand into the sea chest and into the cooling system. It would eventually have gone dead.

THE COURT: It would have been a matter of days

jqbr Reineke-direct 321

or minutes?

THE WITNESS: From hours to a couple of days, your Honor.

Q What elements would it be necessary for you to learn before you could determine how long that engine would run?

A A good long talk with the chief engineer at the time it was going on because he is the only one who would really have a handle on it.

Q Do you think the master making his decision to do what he did spoke with the engineer, would that be normal good seamanship?

A Yes, sir. He has to know what he has.

Q What factors do you think the captain considered in making his decision?

A He doesn't know how hard he is aground, that is the first thing. There is no mention in here of the lunar tide, whether it was coming in or coming out. The first thing he does is talk to the chief and figure out what kind of graound tackle, what kind of ground rigging and what kind of power can he get astern.

THE COURT: I take it nobody seems to disagree that he did the best thing available.

THE WITNESS: I can't fault him, either the captain or the chief on what they did because they were

trying to get the vessel off the strand. I know the weather was bad and they were talking about the 15 foot ground swells but nobody said anything about the tide. Was the tide coming in or going out?

Q I don't know that.

A This can be quite important in a salvage job. If the tide is coming in and he drives this thing on the rocks then when the tide goes out he is high and dry.

Q Don't you think the pilot would have known about the local tides?

A He should have.

Q Don't you think the master should have consulted with the pilot?

A He should have but I don't see anything about the tide.

Q Even without sand entering those parts of the ship can you tell if the ship could have been kept on the rocks by using the engines?

A Yes, you can keep it on the rocks and if the tide goes out you may never get her off or she may break where she is because you start holding her. What happens is your tide changes in the Caribbean like that roughly every 12 hours. You come in and say you strand at low tide. ther you strand at low tide or high tide the result is

almost always the same, if you keep trying to keep her on the strand and the tide is coming in you drive her further up, if she is there to start with she gets harder on.

MR. De ORCHIS: Before we go on with this line may I have one second voir dire of this witness on his qualificatio to talk about tide in the Caribbean?

THE COURT: You are kind of late but go ahead.

VOIR DIRE EXAMINATION

BY MR. De ORCHIS:

Q If you know so much about weather in the Caribbean how come you don't know there is no negligible tide in the Caribbean?

A No, sir, that is not true.

Q Let me show you the sailing directions for this port. Did you read the sailing directions before testifying here today?

A No, sir, I did not.

Q Isn't it true that he Caribbean has no tide?

A No, sir.

MR. MALOOF: This is not on his qualifications.

Q I show you here the sailing directions for Rio Haina. What does it say about tide?

A Less than one foot.

Q How much do you get in New York?

A It depends where you are.

Q 8, 10 feet?

A Yes, Philly 12 feet. What I am talking about is a lunar tide.

Q Are you under the impression that the current the captain is talking about is from tide?

A No, sir.

Q Do you know about the Rio Haina, the river?

A No, sir.

All I am basing my opinions on, sir, is the information I was given.

THE COURT: All right.

MR. MALOOF: That is not in evidence.

MR. De ORCHIS: The sailing directions were put in evidence this morning.

THE COURT: You said that in the Caribbean tide changes every 12 hours.

THE WITNESS: It depends where your tides are. You have a normal tide created by the moon all over the world that runs about two feet. The tide differentials are caused by pouring water in a funnel. As the pull of the moon brings it over it pushes it up an estuary.

THE COURT: This is just curiosity --

THE WITNESS: The sun and the moon. In certain

jqbr Reineke-direct 325

places you will have two high tides and two high tides a day.

THE COURT: I see.

Q In the determination of whether the ship had any other available options besides pulling her off the rocks are the swells also important?

A Yes.

Q Is the current important?

A Definitely.

Q Is the wind important?

A Yes.

Q Are these things the captain would have considered in making his decision?

A I would assume so, yes, sir.

Q Are you able to tell then with the facts you have learned whether or not he had any other available option?

A Than to pull her off?.

Q Yes, sir.

A No, you want to get it off as quickly as you can.

THE COURT: Everybody agrees with that. Mr. Ganly said if that had happened it would have gone.

MR. MALOOF: He gave the impression the ship would have been perfectly safe like that.

THE COURT: He said it would have stayed there.

jqbr Reineke-direct 326

MR. MALOOF: I withdraw my question.

Q I show you page 22 of the survey report of Mr. Ganly, Plaintiff's Exhibit 14, and I ask you if you can identify on that page what Mr. Ganly found to be the damage to the plates on the bow which he called particular average which was caused when the ship was in position A?

A Well, I can read. In the opinion of the undersigned the following damages were caused by going aground, remainder of the damage was caused by efforts to refloat. If done alone, costs as shown below would have been incurred. Item No. 1 --

Q You don't have to read it all.

A You have two flat plate keels in the center of the vessel and the restof them are port side.

Q Do you see any damage to the starboard side of the bow on that survey report?

A No,sir, it even goes through the port side floors and the shell frames in the port. Everything is on the port side.

Q Can we conclude in position A this ship was not wedged in as alleged by Mr. Ganly?

A Well, had it or were it wedged -- you are talking about being captured from both sides, no, because there is no damage to starboard side plates.

Q So that if you had tried, sir, to keep the ship on the rocks using full power forward from what you have read on page 22 of Mr. Ganly's survey report what might have happened?

A Well, I don't know the particular bottom where this thing stranded.

Q Neither does Mr. Ganly.

A Obviously it rises out of the water some place. If you drive it up you will set her hard fast. Here she was blown to port, grounded out toport side first.

Q If she is only stuck on the port bow might she not have slid up to starboard further and slid around to where she was in position B?

MR. De ORCHIS: That is a leading question, your Honor.

A The problem is she went aground from the weather, reduced maneuverability and the weather. She was coming in dead slow. She got on the ground. She went to port to get on the ground. That would be the first contact if the vessel is sailing to port it would be the port side. This is borne out here but as far as being wedged it says there is no starboard plates involved in that first one.

Q No starboard plates on the bow. Thank you.

I offer this in evidence.

MR. De ORCHIS: No objection.

(Defendants' Exhibits N-1, N-2 and N-3 were received in evidence.)

(Recess.)

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HOWARD LAWRENCE MYERSON, resumed.

DIRECT EXAMINATION

BY MR. MALOOF:

Q Mr. Ganly testified here that he made the decisions as to which damages were general average and which were not. What is your prerogative? Don't you make those decisions?

A Yes, I do.

Q You are the one who makes them?

A Yes. Mr. Ganly would tell me what would be floating damage. In my role in stating the adjustment according to the rules I would make the first determination whether that qualifies for general average and I will say that Mr. Ganly after the session admitted to me that he was in error

MR. De ORCHIS: In using the word general average instead of refloating damage.

A All refloating damage is not general average, that is why we are here. He mixed the words up.

Q Mr. Myerson --

THE COURT: In other words, his job was to tell you what was refloating damage.

THE WITNESS: Yes.sir.

THE COURT: And your job is to tell me do I can decide what of that is general damage?

THE WITNESS: Yes. My job was to issue a

commercial document.

Q And you made the opinion that the damage going to port in this case was general average refloating damage?

A Yes.

Q When you made that opinion were you impressed by Mr. Ganly's viw that if nothing had been done that ship was not going to move?

A Yes, I was.

Q If that ship would have been likely to move if nothing had been done would you have given a different opinion on general average?

A I cannot reallay answer that, your Honor. I would have to have the circumstances in which he told me it might be likely to move.

Q Does the fact of whether it is likely to move or not bear upon the intentional nature of it?

A Again, I would say it would depend on the circumstances.

Q General average has to be intentional, doesn't it?

A Yes.

Q To go back to the point for one further question, the point about Mr. Ganly's opinion that the ship would not have moved, if he had given you the opinion that it was likely to have moved if nothing had been done, would that bear upon whether the damage had been caused by an intentional sacrifice?

A It might. I would have to ask for a more intricate explanation of likely.

Q If nothing had been done shall we say that it probably would have moved to port? Let us say Mr. Ganly gave you this opinion. Would you possibly have given a different conclusion in your general average statement?

A Yes, I might have given a different conclusion

Q What would your new conclusion have been?

A I would have asked him in his opinion probably what part of the bottom was likely to have been damaged by this

29 jqbr Myerson-direct

movement and rememver she also had rocking movements too.

Q Would you then have made a better segregation of the damages?

A I would have made a different segregation. I don't know what you mean by better.

Q On the theory that the damage caused by going to port would not have been genera average?

A If he told me it was likely to move and that damage was inevitable.

Q Likely to move. I didn't say inevitable.

A It is very hard to comment on likely without knowing. I would have interrogated him more.

Q I said probably in my next question and you said you would have a different opinion. Would the opinion have been that the damage to the ship's port while she went onto the second position was not in the nature of general average?

A I would have to get further information. If you said it was inevitable and she would have moved, there is no question about it I probably would not have allowed it in general average but that isn't what he told me.

Q If he just told you that it would probably have moved where would the intentional sacrifice have been?

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A There wouldn't have been any. But that isn't what he said to me.

Q That I agree with.

A I must be bound by a professional man's opinion because, as your Honor said, I am a desk man.

THE COURT: In other words, your view of the thing is that if the rope hadn't parted and had been successful then it would have been general average the cost of getting the ship off the reef and back out of the harbor with tug costs and everything else?

THE WITNESS: Yes, that would have been general average.

THE COURT: And any scratching in the bottom as a result of that operation?

THE WITNESS: If it could be shown that it was from the refloating, yes.

THE COURT: It having swung over and gotten stuck here and gotten off, as I understand your view it really boils down to -- and I am just rephrasing your view entirely to see if I can understand it -- your view is that it would be general average if pulling it off the way it was pulled off substantially increased the risk of its landing over here in position B, is that in substance what you are saying?

THE WITNESS Could you repeat that so I can under-

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THE COURT: I am deliberately using different language to see if I have got your point. It is your view or is it your view that whether or not the damage caused at position B as general average depends on whether the towing operations as opposed to just leaving it alone substantially increased the probability of its going over to position B? If just leaving it alone it would have landed it over to position B --

THE WITNESS: I would not have allowed it.

THE COURT: You don't know, of course, you not being the Almighty, whether it would have gotten over there or not. I understand your position that if the towing operation substantially increased the probability of it going over that is general average?

THE WITNESS: Yes.

THE COURT: If it didn't substantially increase the probability of it going over it is not general average?

THE WITNESS: Yes.

THE COURT:Is that your understanding of the law?

MR. MALOOF: I think your Honor may have it right. If the shipowner intentionally increases the risk to his vessel and causes damage to his vessel I think that would be general average in the law.

THE COURT: If this operation substantially

increased the probability of this result then it is general average or it could be said that he intentionally --

MR. MALOOF If that is the intent of the shipowner.

THE COURT: Obviously it was the intent of the shipowner to do the towing. So if the towing that he concededly intended substantially increased the probability of position B, then ordinary people would presume to intend the consequences of their acts.

MR. MALOOF: Your Honor will also have to find that this was foreseeable in the mind of the captain to find intent and is it foreseeable for a 500 horsepower tug and an 8-inch line?

THE COURT: I have no way of getting into the captain's mind but if in fact it is probable, I would say the captain knew as much as this fellow knows.

MR.MALOOF: I would say the captain had no such idea of putting his ship up on the rocks.

THE COURT: Of course not, but did he intend to increase the probability of going up on the rocks?

MR. MALOOF: I would say he had no intention of doing that either. He had a 500 horsepower tug and an 8-inch line. It was not foreseeable that line is going to break with a tug having a bollard pull of ten, 12 pounds.

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THE COURT: It seems to me I have heard enough here and I have to assume that almost any towing operation may result in breaking of a line. If I am wrong on that you will have to correct me.

MR. MALOOF: This was an 8-inch manila fiber line that has a 52,000 pound pull.

THE COURT: I understand that gobbledegook but everything I have heard here leads me to the conclusion that nobody in this kind of job puts a line on without foreseeing the possibility that it may break.

Do you agree with that?

THE WITNESS: Yes, sir.

THE COURT: That is the impression I have gotten from everything I have heard here.

Q I may have trouble with the general average statement. This is very much better, I think.

No further questions.

(Plaintiff's Exhibit 17 was marked for identification.)

THE WITNESS: I don't have a better copy of that invoice. That was my working copy from Sealand. You are either going to have to go back to them or the manufacturer.

THE COURT: See if you can get one between now and 2 o'clock tomorrow.

THE WITNESS: I shall do my best.

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Q What percentage of the 102,000 would my clients have to pay if we prevail on the position A, position A argument?

A Roughly 50 per cent.

CROSS EXAMINATION

BY MR. De ORCHIS:

Q Mr. Myerson, when the time came to appoint experts to examine the bottom of the ship when she was in the shipyard did you ask the underwriters for the cargo interests to appoint surveyors to examine the ship?

A May I go back, Mr. De Orchis, and lead up to that point?

I think Mr. Ganly testified this morning that when he found so much damage to the bottom that he considered to be refloating, he called the general average this morning but he conceded or I conceded for him that it was refloating this afternoon. He telephoned me and said there is a great amount of this type of damage and it might be that the cargo people want to go look at this. At that point I had a conference with Mr. Carlson, my superior. And we called Mr. Joseph Griffin of the Insurance Company of North America. The reason we called Mr. Griffin was for two points. He happens to represent a company which is

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one of the leading underwriters in this market and as it turned out to be did in fact -- I think he is the major defendant in interest. They insured a majority of the cargo. We asked him if he wanted --

MR. MALOOF: I don't know the relevance. We haven't disputed the amount of all this.

THE COURT: My recollection is that you touched on this in the examination.

MR. MALOOF: I don't recollect. Mr. De Orchis raised the point.

THE COURT: He is trying to develop that you had a chance to appoint a surveyor if you wanted to.

MR. MALOOF: We are not disputing the amounts.

MR. De ORCHIS: They are disputing Mr. Ganly who says this is refloating damage and they could have gone and sent their people to look and like Mr. Hendricks they might have agreed with Mr. Ganly. S far every surveyor has agreed except the non-existing one which they refused to appoint.

THE COURT: You told them and they wouldn't do it?

THE WITNESS:Y es.

MR. De ORCHIS: No further questions.

MR. MALOOF: Nothing further.

MR. MALOOF: Yes, sir. We would like to offer page 9 lines 4 to 15.

THE COURT: What does that say?

MR. MALOOF: "Q When were you next contacted by either Mr. Collie or someone else in connection with the BEAUREGARD?

"A The next call that I recall was from Mr. Griffin which was handling vessel's operations in San Juan that the vessel was aground and that they would require assistance from outside from Puerto Rico or outside in order to refloat it.

"Q Did Mr. Griffin tell you anything about the circumstances under which the BEAUREGARD went aground?

"A No, sir, he just told me thatthere was high winds. The weather was bad and he didn't have more details of what happened."

THE COURT: What does that prove?

MR. MALOOF: That proves Mr. Griffin had talked to the captain and reported to Mr. Mello that it was wind that caused the BEAUREGARD to go aground. That ties in with our sail argument.

MR. De ORCHIS: That doesn't strike me as an

THE COURT: He said it would have stayed there.

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admission.

THE COURT: I have heard it before anyway.

MR. MALOOF: Page 10 we offer lines 4 to 25.

Does your Honor want me to read all of this?

THE COURT: I would like you to so he can make a comment as to whether it is an admission or not.

MR. MALOOF: "Did you have any discussion on board the vessel with anyone concerning what had happened?

"A Yes, sir, I did. I had discussed it with the master.

"Q That is Captain Boehm?

"A Captain Boehm.

"Q What did Captain Boehm tell you?

"A Captain Boehm referred to me that upon his arrival in Rio Haina he had a lot of squally weather, rainy, aborted one approach due to visibility. He turned the vessel around and waited for the pilot. The pilot came out and I guess the weather was still raining and they waited until it was clear on both ends of the breakwater so they could see the entrance to the breakwaters and while they were proceeding into the harbor to the best of his recollection the vessel started drifting to the left.

"Q You mean to port?

Court Colloquy 373, 374

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"A To port and he ordered hard right rudder and he got no answer and I guess they had a full engine maneuver and the next thing they know they went off the channel and touched."

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MR. MALOOF: It is in the record by the other witnesses but this is Mr. Mello, the Caribbean marine superintendent of the plaintiff and I think it makes it clearer in the record. I would like it in as far as defendants' case.

Page 19, line 2 to 16:

"Q Did the wind at all affect the vessel as she lay aground when you attended on board?

"A No, sir, the vessel was hard aground and the swell or the wind wouldn't affect it whatsoever, she was really hard aground, we had soundings taken or they had taken soundings after this and she was hard aground, her entire starboard side was hard aground.

"Q By soundings where the bottom was with respect to where the sea bottom was with respect to the ship's bottom -- the deposition was taken in Puerto Rico -- excuse me, you said starboard side?

"THE WITNESS: All along the port side and free the propeller and as I recall aft if I remember aft the No. 6 hatch was afloat."

Page 24, line 10 to 18 --

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"Q Assuming that the drawing I have just referred to was prepared to show how the BEAUREGARD: moved between the time of its initial stranding and the time the line partd what would account for the ship moving both with respect to its heading and with respect to the position between the time the line parted, do you understand my question, Captain?

"A Yes, sir. Your question is what caused it to move from Position A to Position B, let us say.

"Q Yes.

"A Most likely wind and weather I would say."

THE COURT: You read that to him when he was on the stand.

MR.MALOOF: Maybe I didn't remember that. I want to be sure it is in the record.

MR. MALOOF: Page 53, line 24 and 25:

"Q Couldn't the fact that she was partly removed from the strand have caused her to shift to the second position?

"A No, because she was at 2015, two hours after the line parted she was still aground on the bow only so they had shifted."

57, 14 to 25:

"Q So any change as reflected in the log book between

jqbr 13 381

the position on the 5th of May and the position on the 6th of May has to do with the element on the wind and sea, et cetera?

"A To the best of my recollection, yes.

"Q You said you are familiar with Rio Haina. Are you familiar with the port?

"A Yes, sir.

"Q Are you familiar with the sea conditions and the weather conditions which one might expect at Rio Haina?

A Yes, sir."

58, lines 2 to 25:

"Q Will you describe them for us breifly?

"A Well, the sea conditions, squally, weather no different than the rest of the Caribbean area,you have considerable amount of rain and predominantly winds east northeasterly.

"Q Winds?

"A Yes.

"Q East northeast?

"A Yes.

"Q What about the sea?

"A Run anywhere east east south, southeast but there is nothing unusual about the other ports, other ports run into the same weather conditions.

"Q Do you know what Mr. Collie's duties were at Rio Haina in '67?

"A Mr. Collie in Rio Haina, he was the operations manager, he was in charge with direct responsibility to see that the cargo was loaded and discharged off the ship and there was dispatched through customers and consignees and he also

jqbr 16 384

had responsibility with the administration of the office and anything pertaining to the operations of Sealand within the Dominican Republic."

Page 94, lines 8 to 25:

"Q Did you see two drawings, one showing the position of the ship at 1813 on May 5th and another one showing the position of the ship at 8:15 on May 6th, would the ship be expected to sustain bottom damage in shifting from the May 5th position as reflected in the diagram as the May 6th position as reflected in the diagram?

"A It could be. I wouldn't be the one to answer that it could be so.

"Q If on May 5th the Department of the Water at the No. 2 hatch on the starboard side is 30 feet and on May 6th it is 20 feet in the same area, the starboard No. 2 hatch, mat I assume fromthat that the ship has moved from the 30-foot depth to the 20-foot depth?

"A Yes, sir.

"Q Is there any way of telling how far she would have had to be moved in order to effect this change in depth?

"A You could determine how she was moved, yes, sir.

Q Would you expect the ship would sustain some damage in moving from a 30-foot depth to a 20-foot depth?

"A Well, a ship that size with that weight you can

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assume you can have some damage, yes, sir.

"Q Would you study the May 5th drawing in the log book and the May 6th drawing in the log book particularly with respect to the draft on the two days and tell me whether you can conclude from these two drawings that the ship moved somewhat in this two-day period?

"A Yes, sir, I would assume that she moved.

"Q What led you to that conclusion?

"A That the depth of the water on the starboard side are much greater than the port side the day before.

"Q The day before you have already indicated the tide is not much of a factor in the Caribbean?

"A That is right.

"Q So this change of depth was brought about by movement of the ship, is that correct --"

THE COURT: I don't think that is an admission of the plaintiff.

MR. MALOOF: Not necessarily. It is part of the defendants' case.

THE COURT: I don't think it can be used in any way, shape or form. He is not quoting. He is testifying. They are under subpoena. He is not there as an agentof anybody. He is there under subpoena and the defendant had no power to control him and he wasn't there

THE COURT: I tell you what I had in mind to do at some point today, whether you want to talk first or not it is up to you.

I had in mind to outline how I see the case at this moment. That is not in any sense a finding of fact or a conclusion of law. Obviously it could not be a finding of fact because I haven't read the pertinent evidence. It is merely intended as guidance to you as to what I am thinking so those of you who think I am correct on any point can seek to fortify and and anyone who thinks I am wrong can seek to correct. I want to emphasize that this is in no sense a finding or a legal ruling of any sort.

Would you prefer I do that now and let you talk about it or would you prefer that I wait until after you finish talking? I think you have made your positions pretty clear all along.

Probably the best thing to do is let me tell you

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what I am think and then settle on a briefing schedule and decide after I have seen the briefs whether I think further oral argument would be helpful.

Just as to my present inclination based on what I have heard of the testimony that I am going to read, maybe when I read it it will turn out that it doesn't at all correspond to what you both have been saying about it from time to time, first the affirmative defenses I am correct in understanding, I believe, that the non-seaworthy defense both as to the ship and the rope are the burden of proof which is on the defendant. On that assumption it is my present guess that I will find that the burdens have not been met on the rope. I may be completely wrong, what I am completely confused on what evidence you have on the rope. After I read your brief we will find out how you organize all the invoices and I may come to a different conclusion. At the moment I don't see that you have borne your burden on that.

I must say I am impressed and I merely say this to give you an opportunity to show that I am wrong that as I have heard the evidence described this rope pulled the ship against the wind for some feet or yards for a period of ten minutes. I don't quite see -- my initial reaction is that if it were a rotten rope it wouldn't have accomplished

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anything.

On my hunch as to what I would find on seaworthiness, I think it would be helpful if I displayed what I consider to be the law on that.

It seems to me, as I understand it, the law on seaworthiness is the plaintiff is obligated to put its cargo on a ship which is adequate to perform in all respects and circumstances under whatever route it is put on.

I was impressed with the candor and integrity of both witnesses on the issue. But it seems to me, and if you read the testimony with more care than just listen to it, but it seems to me that defendants, the expert from New Orleans, accepting his testimony at full value, didnt' establish unseaworthiness as I understand it. He gave the opinion that in his view the rudder should have been larger or the engine should have been more powerful. Against that he concedes that -- I forget the exact number if a numberwas given -- but numerous ships of this class has been converted and in no case has he ever heard of one with a larger motor or a larger rudder. It seems to me highly unlikely he wouldn't have heard of it if it happened.

It seems to me there is considerable weight to be put on the fact that there are a great number of these

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ships afloat and none of them have ever had any difficulty and this particular ship has been in and out of this particular harbor before. Coupled with what has been described to me with the testimony the pilot made as to handling of the ship,plus the testimony of the plaintiff's expert asto the handling of this particular ship and others like it, seemto wind up to the fact that the defendant has not borne his burden on that issue.

Who has the burden on the issue of whether the defendant or the plaintiff through Mr. Collie? Who has the burden?

MR. De ORCHIS: The defendant.

MR. MALOOF: The plaintiff has that burden because he has to prove the general average act. That is not like proving unseaworthiness which is clearly defendant's burden. He has to prove the ship is coming in.

THE COURT: Let me have your briefing on who has the burden? My present hunch, and again this is also just a hunch, I have been told or the only testimony on that issue is testimony we heard here from Mr. Feliz.

MR. MALOOF: The pilot also.

THE COURT: Yes, Mr. Feliz and the pilot.

I have looked at them and I am told there are statements taken from the pilot in circumstances where if this

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had been a fact it would be expecable that he would have said so and he didn't say so, thatin junxtaposition with Mr. Feliz testimony which I must say I found credible. It may be that on analysis it would be demonstrated that he told untruths on matters that could be demonstrated from the record to be untrue which might affect my judgment of him. But on balance it seemed to me, although he was having difficulty with communications, he was trying to tell the truth. It is perfectly obvious he was interested and he must be considered an interested witness because he was employed by the party calling him.

I can see how his several foul-ups with communications might have created suspicion in the minds of some of the position of defendants' counsel, but to me the way he got fouled and got himself unfouled rather supported his veracity because when he got himself fouled or when he made answers obviously inaccurate and then explained how he made them, because he was interested in what was said, it appeared to me it was believable. I don't know if it will be the same when I read it after counsel point out their views of it. That would be the present hunch on that.

So that brings us down to the crucial question of seaworthiness.

What I am going to do there is make reasonable

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detailed findings of fact because one thing that has become clear to me is that simple logic doesn't dispose of the rules of general average, at least it hasn't been made clear to me. The way I think the law works in this thing is different than the way I would come out if I were starting with a year book. My present hunch is I will find first that the ship went aground, that is the obvious fact, and was stuck with its bow in. I think I wikl find, on the basis of the testimony of the survey witness, Mr. Ganly, principally and the basis of his testimony that it could have been kept in that position for an appreciable length of time had the captain desired to do so. I don't think there is any evidence that that length of time would necessarily have elapsed before the tugs came from how many number of hours they were. However, I think I will also find that it would have been a very unwise decision on the captain's part to have taken that course. Everyone seems to agree that the captain did what he should have done, given the options open to him. He exercised the correct option, namely to try to get off or get unstuck as fast as he could have gotten unstuck.

As I said earlier, I think if I were writing the law of general averages beginning with the experience of Mr. Jonah being stuck in the whale, I would say that that should defeat the claim of general average. What the

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captain did at that point, was it necessary for the safety of the ship, whether he had cargo on her or no cargo, and I think I will find on the basis of all the testimony that I have heard, unless there is something to the contrary in the depositions, that there was no consideration of jettisoning th cargo instead of pulling it off, doing what was done, namely pulling it off the reef.

Captain Mello said there was consideration of jettisoning the cargo if there had been no tug there to pull them off. But he made it quite clear to me that jettisoning the cargo would just have been a foolish thing to do, injuring the cargo without any benefit to the ship.

Therefore, it isn't a situation such as jettisoning cargo where you deliberately sacrifice one part of the total enterprise for its own for the benefit of the rest of the enterprise.

What he did was do what was necessary to save the ship and also, coincidentally, save the cargo.

However, and as I gather, my college classmate Martin Gilmore wojld say this is not general average. This is not a profound study in the matter but what I found out in the last two or three days. He says that wouldn't be general average but I gather he says under American law it is. If I find in effect the shift to position B was

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caused by the pulling off -- and the crux of that finding goes to Mr. Maloof's statement, outside of today's hearing where he withdrew his concession of what I said earlier He says it has to be a direct cause. I agree it has to be a direct cause but from what I have been able to see of the cases, there is just a different way of saying the same thing. If what was done materially increased the probability of what happened then it is a direct cause. Having no way whether one thing caused another thing, it seems to me what you decide is whether A materially increased the position of B. Emphasizing again I am going at this in considerable detail not to demonstrate my certainty but to demonstrate my doubt. Again, I don't know what I will conclude after reading the deposition which isn't the basis of what I heard on cross examination of various witnesses and what the gentlemen might have said about it in different parts of the trial, but it is my guess that I will conclude that the pulling off materially increased the possibility of the shift from A to B.

I again emphasize or it is certainly clear to me of coming to a different conclusion than that because everybody agrees to it. It would be absolutely foodhardy from a ship's point of view for the master to have taken any other course, to try to either do nothing or drive it in,

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which was an option open to him in the sense it was physically possible but it would have been in my judgment; unless I am correct, a foolhardy thing for him to have done.

If anybody wants me to expose my feelings on any other subject I will be glad to do so. I emphasize these are not rulings or findings but only what my thinking is now.

MR. De ORCHIS: Do you want summations from us?

THE COURT: I don't think it will be helpful right now. Unless there is something you want to say right away I will listen to it.

I don't think it will be helpful.

MR. MALOOF: I am the receiver of the battering ram and I think it probably would be better if we briefed it for your Honor rather than for me to try to go into detail on the reasons I think that your findings are erroneous.

I would like to say a few things because it would make me feel better walking back to the office.

THE COURT That certainly is a legitimate motive.

MR. MALOOF: While you are waiting for our papers to come in perhaps your Honor can think about it too. I realize you put these forth as tentative findings.

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THE COURT: They are not even findings.

MR. MALOOF: As a matter of fact, you have not read the eye-witnesses' depositions in the case.

THE COURT: All I know about the eye-witnesses is what you people told me.

The interference of the agent is another matter, your Honor. Not only may it be incredible in this business of the pilot saying only on the eve of trial that he had these radio conversations. Even if you were to find that there was such a conversation between the ship

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and the agent when you read the record you will find that what the pilot says is that Mr. Collie said to him in radio telephone from somewherein Rio Haina, it is now cleared up, you better come in. The question I asked the pilot then, well, had it cleared up and he says yes and that is why I went in. So even if we were to believe that there was such a radio conversation it wouldn't make any difference because all that colloquy would have done is he is helping the pilot by saying how is the weather over there and Collie says it is fine, the pilot looks and says yes, I can see the ranges. Really there is no damage. But the fact is that we interviewed this man at length. They interviewed him at length and never was this business of the agent's interference brought up and neither did there clients when they refused to pay. This is an interesting point in their case. When their clients refused to pay

the money all they said was this was all one grounding. In other words, they were saying we are not going to pay you for getting off this second strand. This was all part of the original grounding. It is inevitable that you were going to go to the second position.

THE COURT: What is your theory about why the pilot came up with this?

MR. De ORCHIS: They were grasping for straws.

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There was even a wilder thing that didn't come out. This tugboat man who testified how he pulled and the rope broke, I have a statement from him saying that he wasn't in Rio Haina at all. He was the man on the second tugboat, the captain of Tugboat 12 which arrived six hours later.

He gives me a signed statement in Spanish saying that he is the man on the second boat which had to be sent for and arrived several hours after the grounding and then he comes in and testified he is the man in RB 13. But the man in RB 13 nobody has been able to find and his name is Gonzalez. Again, if I am to bring everything that tugboat man says word for word as the gospel truth it doesn't hurt my case a bit because he says the ship was certainly in peril and I have to prove that and everybody I think agrees the ship and cargo and everybody was in peril.

Relevant Portions of the Deposition Upon Oral Examination of Captain Harold J. Boehm

Boehm - Direct by Maloof

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HAROLD J. BOEHM, having been called as a witness, being first duly sworn by the reporter, a Notary Public of the State of New York, was examined and testified upon his oath as follows:

DIRECT EXAMINATION BY MR. MALOOF:

Q What is your name and address, please?

A Harold J. Boehm, 6 Wayne Court, Edison, New Jersey.

Q Captain, will you tell us what you do for a living?

A I go to sea as master with Sea-Land.

Q How long have you been a master for Sea-Land?

A Since 1961.

Q Have you been a master of ocean-going vessels all that time?

A Yes.

Q Did you say 1951?

A '61.

Q And in what services have you acted as master for the Plaintiff in this case?

A Oh, European, Puerto Rican, Coastwise, Inter-Coastal.

Q What was your position on May 5th of 1967?

A I was master of the Beauregard.

Q Do you recall that the Beauregard experienced some difficulties on that particular day?

A Yes, sir.

Q Before you were a master, did you hold other positions at sea?

A Yes.

Q Describe them. We want some of your background, sir.

A Well, I first started going to sea in 1934 as a deck cadet at the old Panama Pacific Line. Then I worked my way up through the focsle and was third mate in 1939 and master in 1944.

Q You had a master's ticket since 1944?

A Yes, sir.

Q You consider yourself an experienced master of ocean vessels, don't you?

A Yes.

Q Have you handled ships in heavy weather?

A Yes, sir.

Q Storms?

A Yes, sir.

Q You consider that you know how to handle an ocean-going ship in heavy weather, don't you?

A Yes, sir.

Q Have you handled large ships in fairly close proximity to land?

A Yes, sir.

Q And do you consider that you know how to handle ships in those conditions?

Q If you are close to land and the weather is bad, do you know how to handle a ship under those conditions?

A Yes, sir.

Q This comes from your experience, doesn't it?

A Yes, sir.

Q I'd like you to detail for us the geographical approach to the port of Rio Haina where this particular stranding took place.

Tell us what it's like and the topography of it, what you had to do to bring this ship into port in that harbor.

Excuse me, sir. if drawing a picture would help you, you are certainly allowed to do that.

A Rio Haina is a small harbor in the Dominican Republic. It's sort of in the bight of the coast and you approach on a course of 353 on ranges and enter between a breakwater, which has also some buoys.

The harbor, once you get inside the breakwater you go a short distance to tie up to a dock there.

Q The heading into the breakwater is what, sir?

A I believe it's 343 if I remember correctly.

Q 343 degrees?

A Yes. That's the entrance channel.

Q That's in the middle of the channel?

A Yes, sir, on the ranges.

Q And what is the distance across this channel?

A It's a long time. I --

Q To the best of your recollection.

MR. DeORCHIS: I have a map.

Q If you have any documents, you certainly can refresh your recollection, sir.

A Well, this document is 210 feet and that seems about right to me.

Q What document are you looking at?

A Well, it's a facsimile of a chart of Puerto de Haina, HO 2652.

Q How many times have you been into the port of Rio Haina?

A I was trying to remember that. I'm not sure, but it's been several times.

Q Several?

A Yes.

Q Like three?

A I'd say so, yes, at least.

Q Is that before this particular occurrence?

A Yes, sir. I haven't been in there since.

Q Does that appear to you to be an accurate map of the breakwaters and the entrance?

A Yes.

Q I see on the right-hand side you have a double line with dots around it. That would be the breakwater on the starboard side?

A Yes, sir.

Q And then on the left you have a breakwater that goes to the left?

A Yes, sir.

Q In between you have the channel?

A Yes.

Q Now, was the distance between the breakwaters 210 feet or was that just the channel?

A I believe that was the channel.

Q Would you have some conception or estimate of the distance between the breakwaters?

A No. From here it looks to be about twice as wide.

Q Are you figuring that those two lines go into the entrance of the channel?

A Yes, with the range line down the center.

Q The line that has on it "lights in line 343

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degrees"?

A Right.

Q Now, would you detail for us the occurrences as best you can remember as you first approached the channel to enter the harbor?

Tell us what you saw and what happened.

A Well, when I first approached there was a heavy rain squall coming across from the east to the west that obscured the --

Q Excuse me for interrupting, captain, but just to have the story straight, what is north on this map that we're looking at?

A Well, it's almost straight up.

Q Is it on the map, a mark?

A No, but your -- this line here is 343, so it must be north and south.

Q Would you then, from your experience, make an arrow which would point north roughly?

We're not asking you for compass figures. Just draw it in and then we'll mark the map.

A I would say this is north (drawing).

Q Would you initial that, please?

MR. MALOOF: Shall we mark that for identification at this stage, sir?

Q You may continue.

A Obscured the entrance so I turned the ship around waiting for it to clear, and while I was making that turn the pilot boarded and we started in again the second time, and -- let me get this straight -- I wasn't going to take her in. I was approaching to pick up the pilot.

Q I just want your description up to the time of the first approach.

About where was the ship when you first decided to turn her around because of the rain?

A May I refer to --

Q Yes, indeed.

What are you looking for, captain?

THE WITNESS: This one here. I believe it's in the Coast Guard report.

Q What are you looking for, captain? I might be able to help you.

A There is another report that the Coast Guard -- this one here.

Q Coast Guard report?

A Yes, this is it here. I believe it's in there, yes.

Q What page are you looking at?

A We took arrival at -- this is page 2 -- took arrival with the east end of the breakwater bearing 315 degrees true 1.7 miles distance.

Is that what you wanted?

Q All right, I think so.

Well, what I wanted was the point where the ship was when you decided to turn her around. Does that language describe that?

A I was probably a little bit closer than that. You see, I had slowed down and was waiting for the, looking for the pilot to pick him up, and I would say I was about a mile and a half to the east of the channel entrance.

Q To the east of the channel entrance and how far away from the breakwater on the right?

How close were you to the entrance of the channel there?

A I would say about a mile and a half.

Q You say you were not bringing the ship in?

A No, sir.

Q What were you doing?

A I was going to pick up a pilot. He was going to bring it in.

Q Where were you going to pick him up?

A About a mile off the east breakwater.

Q How did you know that he would be there?

A Because he had been ordered, he had been ordered for me from San Juan. If he wasn't there, I wouldn't go in.

Q Is that a compulsory pilot area?

A Yes.

Q How did you learn that he had been ordered for you?

A Well, I told them in San Juan the time I was going to arrive and they automatically order a pilot for me.

Q When you say you turned the ship, how far did you turn it?

A I made a complete circle.

Q Complete 360 degrees and came around again?

A Yes, sir.

Q And about where did you pick up the pilot, sir?

A Well, that's kind of hard to remember now.

Q Then when the pilot came aboard, did you have any conversation with him?

A Well, we -- I told him that I started a round turn on account of the poor visibility at the entrance, and we finish the turn and started in the second time.

Q What was the name of the pilot?

A Torres, I believe. It's here somewhere. I'll look in the log book.

Q What page are you looking at?

A May 5th.

Q What date?

A May 5th. Pilot E. Torres.

MR. MALOOF: Can we mark that identification that Coast Guard report that you referred to before?

(Whereupon, the above-described document was marked Defendants' Exhibit 2 Boehm for identification, as of this date.)

Q Have you read that Coast Guard report recently, captain?

A Yes, sir.

Q And is that based upon information that you gave the Coast Guard examiner?

A Yes, sir.

Q You would say it's reported accurately?

A Yes, sir, I believe so.

Q Did you know Mr. Torres before this day?

A Yes, sir. I had used him before.

Q Were you satisfied with him --

A Yes, sir.

Q -- as a pilot?

A Yes, good pilot.

Q You consider him a respectable pilot?

A Yes, sir.

Q And a good one?

A Yes.

Q Now, is that the only conversation you had with the pilot, you told him you were making a turn?

Was there no other conversation that you can remember? Try to remember everything you said and everything he said.

A That's pretty hard.

Q The first instance, when he came aboard and as you were finishing up your turn.

A Well, I don't remember now. We just had some small talk, I imagine.

Q Nothing about getting the ship into the harbor?

A A Well, we discussed waiting until the squall moved off, until it was clearing.

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22

Q Now, on the first and second approaches which were aborted, what was the condition of the sea?

A I will have to look here again.

Q Please do.

A The wind was variable from the east 15 to 25 knots and gusty. The seas northeast four feet.

Q What does four feet represent, the size of the swells or --

A No, that's the sea.

Q That's the speed?

A The sea, yes.

Q The current?

A No, that's the height of the sea.

Q The height of the sea?

A Yes.

Q The swells?

A Well, the swells were from 10 to 15 feet.

Q What was four feet?

A The seas. You have seas and swells.

Q And the swells were what size?

A 10 to 15 feet.

Q Now, in your experience have you handled ships of this kind of wind and these kind of seas before?

A Oh, yes.

Q Did they ever give you a lot of trouble?

Q Should they give you any trouble?

A Not usually, no.

Q Gusty winds, is that unusual at sea?

A No.

Q Something an experienced master and the pilot should be able to take care of?

A Yes.

Q And anticipate?

A Yes.

Q Ordinarily 15 - 25 knots of gusty wind usually doesn't founder a ship, does it?

A No, sir.

Q Please describe in your own words, captain, the third approach.

This, of course, is the one where you ran into some difficulty.

A Yes. Well, by the time we turned the ship around the second time, why, the rain squall had passed over and the wind had moderated, which usually happens after a sqaull, and there was no more heavy clouds indicating a squall visible, and we decided that it was safe to go in.

So the pilot lined it up on the ranges and we started in the entrance channel, and, as we approached, why, a heavy wind squall developed and it made the ship hard to handle, which, of course, we couldn't turn

we approached the break --

Q Would you take that paper and just draw the outline of the breakwaters and draw a picture of the ship where it was when that wind squall developed?

A This isn't lined up very well.

Q I just want some relative position, just about how far you were in, you know.

A At the time we decided it was about 600 yards to the breakwater.

MR. MALOOF: Just initial it, please.

Identification.

(Whereupon, the drawing made by the witness was marked as Defendants' Exhibit 3 Boehm for identification, as of this date.)

Q Is it accurate to say that your judgment at that time was that you were too close to turn around again --

A Oh, yes.

Q -- this ship being itself about 400 feet long.

Now, you said the ship was hard to handle. Would you give us a little detail on that? Exactly just what was the trouble?

A Well, this strong wind and later on, we figure that the current that usually ran two or three miles off

the breakwater from east to west was further inshore, which we hadn't anticipated.

Q Wait a minute. You noticed a current at that time that you hadn't anticipated?

A The combination of current and wind, yes, made the ship -- she was setting on the left, you see, to the westward.

Q What was the speed of that current; would you know? Could you estimate it?

A I would say two or three knots.

Q And this current was a complete surprise to you?

A Yes. The pilot didn't, hadn't figured on it. The current is usually further offshore.

Q What was the speed of that current?

A Two or three knots, I would say. I have no way of knowing.

Q And the ship became hard to handle. Did the wind have anything to do with it?

A Oh, yes, the wind.

Q What effect was that having on the ship?

A Well, the wind and the current both, she was setting to the left, to the westward.

Q What did you do to try to adjust to that?

A Well, the pilot gave her a hard right wheel to bring her back.

Q Sure, and what happened?

A And, well, I, by watching the ranges I saw she was setting over there and I figured that we wouldn't clear the west breakwater by enough to get in there and we'd set right down on it and we damaged the ship pretty badly, so I ordered a full astern and I ordered the mate and the focsle head standing by the anchor to let go of the starboard anchor.

Q At that time?

A To hold her, yes.

Q What happened, sir?

A Well, we brought her to a stop but she was to the left of the channel at that time. We didn't hit the breakwater.

Q You weren't up on the breakwater at that time?

A No, we never did touch the breakwater.

Q You weren't stranded?

THE WITNESS: What?

Q Were you stranded?

A We were aground, yes.

Q Your bow was aground?

A The bow was aground, yes.

Q About how far from the breakwater was the bow of the ship, from the west breakwater?

A 15 feet from the breakwater and 20 feet west of the end of the breakwater as it shows in the sketch here (indicating Exhibit 1.)

Q Were you looking at Defendants' Exhibit 1 when you said "this sketch"?

A Yes.

Q And are you referring to one of the drawings of the boat?

A Yes, the one marked 357 degrees.

Q Q And is that the way the Beauregard ended up at that time?

A Yes, sir.

Q Did you take a sounding right away of the water near the bow?

A I believe we did. I can't remember exactly.

Yes, apparently -- oh, no, that's on May 6th.

Q Would you have it in your log book, captain, if you took soundings?

A No, there was so much happening at that time, I doubt whether --

Q You might take a look.

A I don't remember it being in here.

I can't be sure, but I seem to remember that we took soundings forward right away.

Q Then do you remember what they were?

I'm being a little unfair after all these years, unless you can find a piece of paper to look at. I would like to know what the depth of the water was where you were stuck.

A Well, I'm not --

Q Do you have some way of finding out from the documents?

A This is the second position?

Q No, we are talking only about the first position, captain. We'll take this one at a time.

A Well, I seem to remember the soundings were taken that indicated that the bow was astern -- the bow was aground, but I can't swear to that. I seem to have a recollection of it, though.

Q So that what direction would you say the wind was which made the ship hard to handle and made it end up in this position?

MR. DeORCHIS: He said the wind and the current

MR. MALOOF: I'm talking only about the wind now

MR. DeORCHIS: The wind didn't surprise him; it was the curren. that surprised him.

Q Is that true, captain, the wind was no surprise?

A No, I believe we could have handled the wind all right.

Well, let's see --

Q The wind and the current, perhaps?

A Yes, the combination of the two.

Q Then let's discuss the wind alone. Do you know the direction of it?

A Well, in the vicinity of east, somewhere between east northeast and east southeast.

Q Either east northeast or east southeast?

A Wait a minute. That should be here in my Coast Guard report.

Q Yes, please look at it.

A Wind direction, varies from east to northeast.

MR. DeORCHIS: We ought to indicate on the record that the captain is reading from the last document of Defendant's Exhibit 2, which is the Coast Guard report Form CG 2692.

MR. MALOOF: Can I see that?

MR. DeORCHIS: It came apart.

MR. MALOOF: It's not on my copy.

We will consider that part of that exhibit,

Mr. DeOrchis, even though I don't have it on my copy.

MR. DeORCHIS: It's the last page.

MR. MALOOF: We have a stapler here. Suppose I staple these all together.

So, when you were about 600 yards from the entrance to the channel you say that a surprise in current and a gust of wind put the ship out of control; is that true?

A Yes, I would say so.

Q So it took the ship out of human hands and put it in the hands of nature, didn't it?

A Yes.

Q And it ended up stranded in the position of the drawing of the ship on the Coast Guard map on which is 357 degrees?

A That is correct.

Q Now, presumably there was no more small talk between you and the pilot. What did you say to each other?

A It's a long time ago. There was a lot going on there.

Q If you remember.

A I don't remember what we talked about.

Q Do you remember, then, was the ship in a position of peril?

A Oh, yes.

Q What did you fear?

A Well, I feared that the wind and swell would increase and drive her further ashore.

Q If the wind and what?

A And swell.

Q If the wind and swell didn't increase, there was no danger?

A Well, of course there was still danger there, yes, laying in that position.

Q Let's leave out the increase.

What did you fear over all might happen if nothing were done?

A Well, I feared that there was a wreck already there alongside the breakwater and --

Q Is that the drawing of the ship broken in half on that Coast Guard map?

A Yes, sir. I figured that the stern would swing right around and land right up there where it was and the ship would be broken up.

Q At the least, there would be further damage to her?

A Oh, yes.

Q Bottom damage, right?

A Yes.

Q What eventually did happen to the Beauregard?

A What do you mean?

Q What did happen after all is said and done? What happened to her before she was freed?

A Before she was freed? You want me to describe our attempts to --

Q No, just where did she end up? Did she move?

A Yes, she moved to that second position on there.

Q Which is marked --

A 015 degrees.

Q And she stranded along the bottom, right?

A Yes, sir.

Q The whole bottom?

A Yes, sir, port side.

Q So can we reasonably say that what happened is what you feared would happen? Is that a fair statement, sir?

A Well, I figured it would be even worse than

that.

Q That's a question of degree.

A A Yes.

Q But you feared she would move to the port --

A Yes.

Q -- and be stranded along her whole bottom, didn't you?

A Yes.

Q Isn't it what happened anyway? Is that a fair statement?

A Well, she, she became stranded on the port side, yes.

Q Along the whole bottom from hatch number 1 to hatch number 7?

A Well --

Q Stop me if I'm not being correct.

A Well, by 8:00 that night when we took further soundings she wasn't, she was still only aground at the bow.

Q What was the heading at that time?

A 015 through.

Q Oh? Did she go further over?

A Yes, she slipped further to the west.

Q Where was she aground then?

A At 0600 the next morning we took soundings and she's on the heading of 016. That's only one degree.

Q She's stranded abeam, isn't she, on the port side?

A She's stranded the whole length on the port side.

Q All I'm asking is, isn't it a fair statement that that's what you feared would happen if nothing was done?

A Well, I feared much more would happen. I thought she would go aground further.

Q But isn't that a question of degree?

A Yes.

Q This is what you feared would happen, that she would strand in this position or something like it?

A Or worse, right.

Q It could always be worse, sir.

A Yes.

Q From the deck log, May 6, and the drawing contained therein and apparently those numbers on both sides of the ship represent soundings that were taken?

A Yes, sir.

Q Can we say she stranded on port and starboard both?

A Which one are you looking at now?

Q There is only one drawing on May 6.

A On May 6?

Q Yes, the heading is 016.

A Well, the draft was 18 feet forward.

Q Are those the drafts, the numbers along the ship?

A No, those are soundings.

The draft sailing from San Juan was 18.03 forward and 25.05 aft, so, on the starboard side --

Q Were soundings of 20 and 21 and 22 --

MR. DeORCHIS: He hasn't finished his answer.

MR. MALOOF: I'm sorry, I didn't mean to interrupt.

MR. DeORCHIS: So, on the starboard side?

THE WITNESS: On the starboard side, you see, you've got 20, 20, 25 feet, 21, 22. The stern wasn' aground on the starboard side.

It is grounded up forward still, way, way up close to the bow.

Q Well, along about amid ship towards aft on the starboard side you have soundings of 21 and 22?

A Yes.

Q Are you saying that she may not be stranded?

A Her main draft is 21.10.

Q There's ten inches there?

A Yes.

Q She's probably touching, isn't she?

A Yes.

Q On the starboard side?

A (The witness nodded.)

Q At least touching all along the starboard side, wouldn't you say?

A Well, not completely.

Q At least touching?

A Oh, yes.

Q You haven't used up that much weight coming from San Juan?

A No.

Q So that I take it then, captain, you don't remember any of the conversations, not even approximately or roughly, with the pilot at this time?

You must have been making suggestions and things like that.

A Probably were, but I don't remember what we talked about.

A Well, shortly after we grounded our agent in Rio Haina, Mr. Callie came out on the breakwater.

Q Is that Callie or Collie? I thought it was C-o-l-l-i-e but you had C-a-l-l-i-e.

MR. MALOOF: We can ask Mr. Roethke of Sea-Land.

MR. ROETHKE: C-o.

MR. MALOOF: I'm sorry to interrupt you. It was just for the record.

A (Continuing) He came out on the breakwater and he had a citizen's band walkie-talkie. I think that's when we communicated with him.

Q How did he learn about the stranding?

A He was standing on the dock, waiting for us to come in to dock.

Q He saw you?

A Oh, yes.

Q And then he had a walkie-talkie and communicated that way with you?

A Yes, sir.

Q Do you remember any of that conversation?

A Yes, I remember -- I think I have it in here that he told me about the weather, he told me he would

time to time -- when I first talked to Mr. Collie he cautioned me about the possibility of the wind and sea increasing from the southeast.

Q Captain, in your statement of May 12, 1967 you say "On May 5th at 1925 I was in contact via radiophone with Mr. R. Callie" -- meaning Collie -- "the Haina Sea-Land representative."

A Yes, sir.

Q There was a radiophone, wasn't there?

A Well, by that time I believe he went to the Harbormaster's office or on one of the tugs.

Q You say he might have been on one of the tugs?

A He may have been. I don't know where he was

Q You don't know?

A No.

Q But you do know you were in contact by radiophone?

A Yes, later on, yes.

Q You don't know where he was, right?

A No.

Q He might have been in his office?

A No. He didn't have a radiophone.

Q Have you been in his office? You know that?

we would have been in contact with him if there was a radiophone.

Q What I have just shown you on that page, captain, would that be the Beauregard fully loaded with containers?

A This is a trim table but, yes, it shows --

Q It shows containers, doesn't it?

A It shows the containers, yes.

Q And you say the Beauregard did not have all those containers aboard?

A Oh, I imagine it did, but how many were empty and how many were loaded I don't know offhand.

Q Well, if you don't know, I don't know.

A It's in the cargo plan.

Q Does the stowage plan help you?

A Yes, sir.

Q This ship can carry 60 containers, I believe, on deck?

A 226 -- oh, on deck? Yes.

Q You say 226 all together?

A Yes, sir.

Q How many containers did it have on board?

A It had 216 containers, plus 13 tanks.

Q What kind of tanks?

A Well, they're in the form of a half container.

Q Those are containers to carry liquid, I take it.

A Yes.

Q Those are half containers, right?

A It's hard to read, but it looks like they've got 11 empties here.

Q Do you know where they're stowed?

A I can find out. It looks like they were stowed on number 1 hatch.

Q On number 1 hatch?

A Yes, sir.

Q Under deck or on deck, sir?

A On deck, on the hatch.

Q Forward?

A Yes, sir.

Q All the other containers, then, were filled, is that true?

A Well, how full they were I don't know offhand.

Q No, we don't know that.

A Some of them are full and some of them are partially full.

Q On deck forward of the bridge, how many tiers of containers were there? Can you tell?

A At that time?

Q Yes, sir, at the time of the stranding.

A Forward of the bridge, let's see -- you had all these --

Q I want to know how many tiers high they were.

A Oh.

Q One, two, three, four?

A They were two, two tiers here on each hatch.

Q Forward of the bridge?

A Yes.

Q And, after the bridge, on deck, how high?

A Three tier high.

Q Captain, have you ever before been either a captain or another officer on a ship which has stranded?

A Well, at the beginning of World War II I was on a ship that was stranded when I was third mate.

Q We got up to the period of time when your bow is stranded.

What decision was made, sir, at that time?

A Well, to get some tow boats out there and help us get off as soon as possible.

Q How did you go about doing that?

A Well, the agent sent a tow boat out very shortly and I sent a mate aft and crew out to pass them a line to heave on the starboard quarter to try to swing her off.

Q What was the name of that tow boat; do you know?

A Yes, it's right in here. It's the Dominican tug RB 13.

Q Just the one tug at that time?

A At that time, yes.

Q Will you tell us what the tug did?

A Well, we -- he took a line from the starboard quarter and started heaving on it and the vessel started

coming free and the --

Q What indications were there that she was coming free? Was there some physical evidence of that?

A Yes. We could see the stern swinging to the right.

Well, we can see her coming around.

Q Was there any other physical evidence? Was there a rise and fall of the ship?

A Yes, while in that first position the stern, we could see that that was free, anyway, because it was going, rising and falling with the swells.

Q She was free anyway before the tug came?

A The stern.

Q You weren't stranded at stern in the first instance, were you?

A Beg your pardon?

Q You weren't stranded at stern in the first instance?

A No, just up in the bow.

Q What affect did the tow have on the front of the ship?

A Well, the bow remained in position but she started, the stern started swinging to starboard and coming off.

Q She started to come free?

A Yes, sir.

Q Did the bow start to come free?

A Yes, that moved aft, yes.

Q That moved out? Then what happened?

A Well, then, the line parted on that tug boat.

Q Why did it part; do you know?

A Well, apparently due to the heavy swell, the tow boat was heading right into the swell, you see, and when a swell came, why, it would slow him down and put some slack in the line, and when he went down the other side of the swell, why, it put an extra-heavy strain on it, and that. no doubt, caused it to part.

Q Was there anything that the tug could have done to avoid this line breaking?

A I doubt it.

Q The RB 13, would you say, did excellent work at that time?

A Well, as good as a tow boat in that type of port would do, yes. Not as good as tow boats in New York harbor.

Q Then you're saying that there was nothing he could have done to keep the line taut because of the swell; is that it?

A Well, I have never been aboard one of those tugs. I don't know what his situation was.

Q But you have no criticism of that tug at that time, captain?

I refer you to your statement before you answer that.

A Well, I tried to --

Q You are under oath.

A I tried to get him to take another line. I was disappointed that he didn't take another line.

Q Q Did you order him to take another line?

A Well, I requested him to.

Q And he refused?

A Well, he just didn't do it. Apparently, he felt it was too dangerous.

Q Looking ahead a little bit, you asked these Dominican navy tugs not to let go of lines and they did let go of the lines later on, didn't they?

A Later on, yes.

You see, I was speaking to the pilot. He couldn't speak English and I couldn't speak their langua

Q But you had communication with a translator, right?

A Yes.

Q An interpreter. I show you that part of a report of the Salvage Association of London, dated August 10, 1967, which contains a statement by you, dated May 12, 1967.

I ask you to read that statement, pages 1 and 2.

Did you read the statement, sir?

A Yes, sir.

Q Do you remember making it?

A Yes, sir. That's the same statement I submitted to Sea-Land.

Q On the same date? The statement has the same date?

A It's word for word, May 12th, yes.

Q Is that statement true and accurate?

A Yes.

MR. MALOOF: Would you mark pages 1 and 2 for identification?

MR. DeORCHIS: You have a copy of the Captain's statement.

MR. MALOOF: Shall we mark the actual statement that you have, Mr. DeOrchis?

MR. DeORCHIS: Right.

(Whereupon, the above-described document was

marked Defendants' Exhibit 5 Boehm for identification, as of this date.)

Q As a matter of fact, captain, after the line broke didn't the RB 13 refuse to take another line?

A Well, he just didn't, no, he didn't take another line.

Q Your statement says he refused.

A Yes.

Q So, didn't he refuse? You asked him and he said no?

A Well, I don't know whether he said no or not. I asked him through the pilot, but he didn't take the

other line.

Q Could this pilot speak English?

A Yes, sir.

Q Then you asked him to go to the port side and push at number 6 hatch?

A Yes, sir.

Q Which he did from 1842 to 1843?

A Yes.

Q And then he stopped in spite of your request for him to continue?

A Yes, sir.

Q And then he resumed pushing intermittently?

A Yes.

Q Would you explain that, please?

A Well, I don't know what problems he was having, but that's the way it worked out.

Q Weren't you in communication with him?

A Well, through the pilot, yes.

Q Did he tell you he had any problems?

A No.

Q He just was refusing?

A Well, I don't know. The pilot didn't tell me everything he said.

Q All in all, you say this is excellent salvage

work?

A No, I wouldn't say excellent. It's good for them.

They're not salvage tugs. They usually just dock and undock ships.

Q Later on some tugs of the Puerto Rico Lighterage Company came?

A Yes, sir.

Q Where did they come from?

A San Juan.

Q What kind of work did they do?

A Very good.

Q Because I note that you say, "In contrast to the Dominican Navy's assistance, the tugs Borinquen and Cabo Rojo of the Puerto Rico Lighterage Company did excellent work aiding us."

A Yes, they're experienced in that type of work.

Q So that we can say that the Dominican Navy at the least, did not do excellent work?

A Well, they're not professional salvage men.

Q Now, this tug took a line off the starboard quarter?

A Yes.

wasn't it?

A Yes, sir.

Q In your opinion, if she had taken another line, would the ship have been freed?

A Well, I don't know. He may have run into the same problem.

Q Assume that he could have kept the line taut and not snapped it?

A Yes, if he had that, if he had that ability, yes, against swell.

Q In your opinion, the ship would have been freed at that time?

A Yes, sir.

Q What about his efforts pushing on the port side; did that have any affect on the ship?

A As I remember it, I don't believe so, no.

Q What happened after that line broke?

A Well, she swung back to the westward and ended up in that second position on that sketch.

Q Which one is that, captain? Where it's 015?

A Yes, sir.

Q The position she stayed in until she was eventually freed?

that didn't happen immediately during -- during the night sometime she gradually worked over there.

Q Now, looking at these two sketches of the ship in different positions, what's the distance between the bow of each drawing, approximately?

A It's kind of hard to say from that.

A Well, I'd say 75 feet or so.

Q Were you aboard the ship all that time?

A Yes, sir.

Q Captain, while the ship is in distress, were there swells, was the ocean causing swells?

A Yes, sir.

Q Of about what size?

A About 10 to 15 feet.

Q These are good sized swells?

A They're fair sized.

Q Fair sized?

A (The witness nodded.)

Q Did they have an affect on the Beauregard?

A Yes, they, they tended to force her around more further to the westward.

Q Did they have any other affect on her besides that?

A I don't know what you mean.

Q Well, I am asking you what physical affect the swells had on this ship.

What movement did it cause the ship to make?

A Well, she pounded slightly, occasionally.

Q She pounded?

A The swell would lift her and drop her.

Q Now, were the swells continuous, captain, pretty much?

MR. DeORCHIS: Can we get a point of time here? When are we talking about?

Are we talking about when she first grounded, after the line parted, or the next day?

Q Is the pounding limited to the time after the line broke? Weren't there swells before that?

A I don't remember any pounding at the start.

Q I think you testified there were swells of 10 feet?

A Yes.

Q Before the stranding even happened. Did she suddenly cease --

MR. DeORCHIS: She was only aground at the bow.

MR. KENNEDY: Are you testifying, Mr. DeOrchis?

MR. DeORCHIS: No, I am saying this is why it's important to establish the time. The question was general.

If you are interested in the pounding, then we ought to establish when we are talking about, what time.

MR. MALOOF: We'll let the captain tell us when she pounded.

Q Would you tell us that, sir?

A May I look at the log book here to see that?

The first entry I can -- may I look at this again?

Q Yes.

Now, I have one here at 0730 on May 7th, "vessel commenced pounding slightly."

Q What causes the pounding?

A Well, the swell raising it and dropping the vessel.

Q If you have a swell on another day, doesn't that cause pounding?

A Yes.

Q Don't you have a heavy swell on May 6th?

A Yes, sir.

Q The middle of the night?

A Yes, sir.

Q Is it possible you just were too busy to put the pounding in at all times, write it in the log?

A It's possible.

Q Isn't it possible it pounded from the moment it stranded?

MR. DeORCHIS: I object to any questions about

Q Captain, everything is not put in the log book in terms of emergency, is it?

A Well, that's true. We're usually pretty busy.

Q Isn't it possible this ship was pounding from the moment it was stranded, from the same heavy swell?

A No, I don't remember any po nding when she first went aground.

Q Your memory seems to have improved since we started this deposition.

Now, we may get some further questions answered if you can remember that well. Now, what causes pounding?

What does the ship do when it pounds, the expression you use?

A Well, the swell raises the ship and drops it down again.

Q It raises it off the strand, doesn't it?

A Yes.

Q And drops it down?

A Yes, sir.

Q So, for that moment, it's free, isn't it?

A Well, not necessarily the whole length of the

Q It's only caught by the bow.

A Yes.

Q If it's going to pound, it's got to be off the rock to pound, doesn't it? Isn't that a fair statement?

A What do you mean by that, it has to be off the rock?

Q In order to pound, it's being lifted and it comes down again, doesn't it?

A Yes.

Q Isn't that how it got 155 feet away from where it started?

A You mean the swell moved it?

Q Among other things, I suppose.

A Yes.

Q Didn't it raise up off the rocks to move the bow 150 feet, not 75 as you testified?

A Well, when we had a strain on this first line the ship moved, yes.

Q It moved off the rocks, didn't it?

A Not entirely, no.

Q It moved off, it moved?

A It moved, yes.

Q It was coming free?

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A Yes.

Q That meant it moved?

A Yes.

Q Captain, May 5th at 1813 says "The bow is aground about 15 feet from and 20 feet inshore from the end of west breakwater."

At 2208, same day, "Vessel has by now moved to westward so that bow is approximately 175 feet inshore of end of west breakwater."

Now, do you wish to change your testimony that it took all night as untrue?

A Where do you read that in the log book?

Q I am reading from the excerpts. I assume they're proper excerpts. They were given to me by your counsel.

Q The bow aground about 15 feet from and 20 feet inshore of west breakwater.

A Yes, sir, I see that.

Q Okay, you got that. Now, same day, go to 2208. Do you see that, "Tug RM 17 fast on starboard quarter"?

A Yes.

Q "Various phone calls made by master to agent ashore." Those are phone calls, right?

A Yes.

Q "Vessel had by now moved to westward so that bow is approximately 175 feet inshore of end of west breakwater."

Do you read that?

A Yes, sir. That's in there, but you asked me to judge off that sketch how much she moved.

Q I didn't put it that way at all.

A That's the way I understood it.

Q Well, do you wish to change your testimony that it did not take all night to move 155 feet?

A Yes, sir, I'll change that.

Q It went over there pretty fast, didn't it?

A Yes, she started to come off, yes.

Q She was off, wasn't she?

A No, sir.

Q You can't go over that fast mounted on the rocks.

A Why not?

Q She was in the water, wasn't she?

A No, sir. If we had her off, we wouldn't have stayed there.

Q Did you discuss this with your counsel yesterday?

A No, sir.

Q That it had to stay on the rocks?

A No, sir.

Q Now, captain, we have here from your own log book a movement of 155 feet in like less than two hours. It seems to me you should have put your seat belts on as fast as you're going.

MR. DeORCHIS: Let's not be facetious. This

is a serious case.

Q Do you remember that particular time when she moved? Now, do you remember better than when we started?

A Well, I remember her moving, yes.

Q Now, you said she was pounding at that time, right?

A No, I don't remember saying that.

Q She didn't pound?

A I don't remember. I don't think so.

Q Do you know what kind of ground the bow was stuck in?

A I believe that was all coral. I'm not sure.

Q It wasn't a beach, was it?

A I'm not sure any more.

Q Was it on a beach, sandy beach?

A The first time she went aground?

Q No, when she moved.

A Oh. No, I doubt that. I don't know.

Q You don't know?

A I don't remember, at least.

Q You don't know if it was a beach or rocks or what it was, do you?

Was it part of the breakwater?

A Oh, no.

Q Was it coral, you think?

A Yes, I think so, yes.

Q Is coral smooth or rough?

A Well, it's usually rough.

Q You think your ship moved -- the bow I am talking about, not the stern -- physically moved -- not a change of direction, physically moved its position 155 feet and you can't remember whether she was pounding at that time; is that your testimony, sir?

A Not that first night. I don't remember whether she pounded then or not.

Q So you don't really remember that period of time, do you?

You said you did. Do you want to change that?

A What do you mean by that?

Q I asked you if you remembered this period when she moved --

A Yes, sir.

Q -- and you said yes.

A Yes, sir. I remember that.

Q But you don't remember anything about it, do you?

A Oh, no, I don't. That's seven years ago.

Q Do you remember the huge concrete blocks that

were there where the bow was imprisoned?

A The breakwater blocks, yes.

Q You do remember those?

A Yes, sir.

Q You'd have to pound some to get over those, wouldn't you?

A Yes.

Q The ship did go over those, didn't it?

A No, sir. How could it go through the breakwater?

Q Well, it moved?

A Yes, but it moved aft into the westward.

Q Will you look at this map of the Coast Guard which has been marked Defendants' Exhibit 1? The 357 drawing is east of a wreck?

A Yes, sir.

Q And the 015 drawing is about in the middle of the wreck?

A Yes, sir.

Q Is that accurate?

A Yes.

Q That, of course, is your memory of the situation?

A Yes.

Q Do you recall this wrecked tanker, captain?

A Yes, sir.

Q Do you recall that she was resting on big concrete blocks?

A No, sir, I don't recall that.

Q I think we described the pounding, that it has to raise up to pound. Did we establish that?

A Yes, but the whole ship doesn't necessarily have to be free.

Q Well, do you know how it was pounding? How was it pounding?

A What do you mean by that?

Q What was the physical effect on the ship of the swells, ten-foot swells?

A Well, it occasionally raised the ship and dropped it down again, but that's not the whole ship.

Q It would have to be that part of the ship that was stuck on the rocks to pound, is that a fair statement, captain?

A No.

Q Well, would you --

A The bow could be aground and the stern could be raising and dropping.

Q It could be. Is that what you say happened?

A Yes. The bow was always aground.

Q Now I show you a letter written by Mr. Spitz to Mr. Schumacher, dated November 22nd, 1967.

Do you know Mr. Eugene Spitz?

A I met him yesterday, yes.

Q Do you know who he is?

A Yes.

Q Who is he?

A He's head of the Loss Prevention and Claims, Sea-Land.

Q Do you know what part of his duties are?

A Well, the insurance end.

Q Does he also have a duty to investigate cases like this?

A I'm not -- I suppose so. I'm not sure -- too familiar with his duties.

Q Read the paragraph at the bottom of page 1 which ends at the top of page 2.

Have you read that?

A Yes, sir.

Q Do you agree or disagree with Mr. Spitz' comments?

A Well, I agree in that they weren't professiona salvage men and they didn't, probably never had any

experience in that line of work before.

Q And, with that comment, you agree with what Mr. Spitz says; is that true?

THE WITNESS: May I see it again?

MR. MALOOF: Sure.

A Well, I agree insofar as in that they weren't used to that type of work. They were inadequate in that regard.

Q With that comment, would you then agree with what Mr. Spitz wrote?

A More, yes.

Q The paragraph I referred you to.

A Yes.

MR. MALOOF: Identification.

(Whereupon, the above-described letter was marked Defendants' Exhibit 6 Boehm for identification, as of this date.)

Q Captain, I show you an inter-office communication from Mr. Collie to Mr. Spitz and ask you to read it, just the top two pages.

Let's identify it by date, is there a date on there? Dated May 26, 1967.

Yes, captain?

A What do you want to know about this?

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Q Oh. Do you agree with it, the comments Mr. Collie made?

Q Do you agree with all of them?

A Well, that's a --

Q If you don't agree with any, that I would like to know.

A I don't know anything about billing and invoices and those matters. I never run across that.

Q Aside from those, do you agree with it?

A The times used -- he's got times there, each vessel was used. I suppose that's right.

I could check it with the log book here, what we have.

Q Aside from that, do you agree with the comments made?

A What else is there?

Q Well, read it.

MR. DeORCHIS: The claim of the Dominican Navy for payment for its service. The services were paid for.

MR. MALOOF: I thought you were referring to, by the payment, the hull underwriters in England, Leslie & Godwin.

Q Captain, Mr. Collie says in the second paragraph, "In the first instance, because of the urgency in floating the Beauregard before she further beached herself, the Dominican Navy was asked by the undersigned on the evening of May 5th to cooperate to its fullest extent."

Do you agree with that sentence?

A Yes.

Q Was Mr. Collie around on the ship or standing

nearby at the time the RB 13 was pulling on the wire?

A I believe he was on the breakwater.

Q He was watching?

A I believe so. I'm not sure.

Q He says --

THE WITNESS: What are you talking about now, the RB 13 or the frigate?

MR. MALOOF: I'll withdraw that question.

(Afternoon session - 2:35 P.M.)

Q Captain, you have been handed a statement dated October 6, 1969 --

A Yes, sir.

Q -- and you have been asked to read it.

Have you read it?

A Yes, sir.

Q Do you remember making that statement?

A Yes, sir.

Q Did you make it?

A Did I make it? Yes, sir.

Q You signed it on the third page?

A Yes, sir.

Q And initialled each of the pages?

A Yes, sir.

Q Is everything in that statement true and accurate?

A Yes, I believe so.

Q Who were the witnesses for that statement?

THE WITNESS: That's your signature, isn't it?

MR. ROETHKE: If it's the one I'm thinking of.

MR. KENNEDY: Referring to Mr. Roethke.

MR. ROETHKE: Yes.

Q One of the witnesses was Mr. Roethke?

A Yes.

Q Who is sitting at this table right now across from you?

A Yes, sir, that's right.

MR. MALOOF: Identification. Make a note that Mr. DeOrchis can't find the original of this statement right now. By agreement we will mark the copy.

(Whereupon, the above-described three-page statement dated October 6, 1969 was marked as Defendants' Exhibit 8 Boehm, for identification, as of this date.)

Q Now, when you first had the RB 13 take a line to the starboard quarter --

A Yes, sir.

Q -- was it in your mind that, if handled right, she could refloat this ship?

A Yes, sir.

Q But, apparently, it wasn't handled right?

A Well, I wouldn't say that. The weather conditions were against us.

Q Well, your statement says, "if handled right"?

A Yes.

Q Now, you knew about the swells, didn't you, at that time?

A Yes, sir.

Q So you had that in mind?

A Yes.

Q Didn't you figure that the tug captain could also have it in mind?

A Yes.

Q And could handle it right with the swells in

mind?

A Well, I realize there was a possibility of the line parting. That happens quite frequently on tow boats.

Q If the line is not kept taut, there is a very strong possibility of it breaking, isn't it?

A Yes.

Q Isn't that how you break a string? You first of all slacken it and then snap it?

A Yes.

Q As a matter of fact, down on the bottom of page two of your statement you say "Unfortunately, the tug permitted slack to develop." That means that he allowed slack to develop?

A Well, it may be a poor choice of words there.

Q You have already told us this is true and accurate.

A Yes.

Q Do you want to change that?

Boehm - Direct by Maloof

A I don't know how to put it, but with the sea and swell running as it did, I don't believe he did it deliberately.

Q I don't have any proof. I don't think you do, that he did it deliberately.

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A No.

Q Negligence is not deliberate conduct.

A No.

Q On the bottom of page 2 you say, "This allowed the stern to swing to the left and the vessel settled in a new position."

Of course, the bow also moved, didn't it?

A Well, it moved astern, yes.

Q Moved where?

A It moved astern into the westward, yes.

Q Moved to the westward, right?

A Right.

Q And astern, both?

A Yes.

Q Could you tell us the circumstances under which you made the statement of October 6, 1969 which is over two years after the occurrence?

A You mean how I came to make this statement?

Q Yes, sir.

A Well, Mr. Roethke came down to the ship I

was on at that time, the Jacksonville, I don't know why he wanted a statement then.

Q He didn't tell you why he needed it?

A I don't remember.

Q Because you did make one back in '67?

A Well, that's my report to my immediate superior, yes. Every time something happens we always write a report.

Q That's a statement too, isn't it?

A Yes.

Q But he didn't tell you why he wanted another one in 1969?

A Gee, I don't remember.

Q Did anybody help you to prepare that statement?

A No.

Q I'm going back to your statement of May 12, 1967. In that statement you say, "Our port bow was up against the stem of a wrecked tanker, lying parallel to and against the breakwater."

A Right.

Q Was it right directly up against that wrecked tanker?

A As I remember it, yes. I think we had some scratches on the port bow, side of the bow there.

Q I think you testified, captain, that you were in communication with Mr. Collie who had a walkie-talkie. Were you in communication with his walkie-

talkie with your radiotelephone?

A Oh, no. That, on that ship we had citizen bank walkie-talkies and the radiophone on the ship was AM.

Q. Captain, I show you a photograph which is in a newspaper called, it looks like, Listin Diario, May 10, 1967.

Is that photograph on page 10 a true representation of the Beauregard at the time she was stranded, looking, apparently, from the starboard side?

A You mean that's not when she first went aground?

Q I don't know when it is.

A That's later on because --

Q Is that a true representation of the ship?

A Yes, apparently so.

Q At that time.

MR. DeORCHIS: The question was --

Q It looks like it probably was when she was heading 015 because she's like in the middle of the tanker there?

A That's a Puerto Rico lighterage tug and they didn't come until a day or so later.

Q With those comments, would you agree with that

A Yes.

Q — as a true representation?

MR. MALOOF: Identification; just a photograph.

(Whereupon, the above-described photograph was marked as Defendants' Exhibit 9 Boehm for identification, as of this date.)

Q I show you another photograph, captain, from the same newspaper, dated May 9th, 1967, on page 6 and ask you if that's a fair representation of the Beauregard during the time she was stranded next to that stricken tanker?

A Yes, sir.

MR. MALOOF: Identification, please.

Q I am showing you four photographs which were given to me by your counsel, and I ask you if these are true representations of the scene that we're talking about?

I'll save time by asking all four at once.

A Yes, they appear to be.

(Whereupon, the above-described four photo-

graphs were marked as Defendants' Exhibits 11, 12, 13 and 14 Boehm, respectively, for identification, as of this date.)

Q Captain, I show you Defendants' Exhibit 12 for identification and ask you if it shows the area where the Beauregard was to dock?

A Yes, up in here, on the other side of the breakwater.

Q Would you put an L towards that or put a circle around it or something?

A Well, actually it's up in here.

MR. MALOOF: The captain has put a circle around an area on that photograph.

Q Captain, in your statement of May 12, 1967 you say that, "Apparently the current setting across the entrance was much stronger and further inshore toward the entrance than the pilot had anticipated."

Why did you use the expression "apparently"? Does that mean you're not so sure about that?

A Well, I'm sure the current was, was, was strong, but it's hard to tell where it was, and, apparently, it was inshore where we expected it to be.

Q Is that perhaps one of the explanations that the pilot gave you?

A No, I don't remember talking to him about that.

Q Not even after the stranding? Didn't you ask him?

A We probably did, but we both, we both knew that the current was inshore and stronger. We must have talked about it.

Q But in this statement you say "apparently" and in the statement two years later you don't say apparently; you are more positive?

A Well, I don't know why I put --

Q This is four days after the ship is freed.

A Yes. Well, I don't know why I used the word "apparently".

A You don't shut out cargo at one port.

Q Captain, did you see anyone taking pictures when the ship was stranded?

A There were a lot of people out on the breakwater taking pictures.

Q One of the early things that you did when danger threatened was to drop your anchor in this case?

A Yes.

Q It stayed down, didn't it, all the time?

A Most of the time.

Q Except when it was strategic --

A To raise it.

Q -- to bring it up, so, most of the time, it was dragging the anchor, too, when that ship was moving,

right?

A Well, naturally, with the anchor when we were going in there, it was leading aft, yes.

Q When this ship moved that 155 or so feet, the starboard anchor was down, wasn't it?

A Yes, sir.

Q Captain, I refer to photograph Defendants' Exhibit 11 and I refer also to your testimony that the Beauregard when she first stranded had her port bow up against the stem of the wrecked tanker.

A Yes.

Q And I would ask you to look at the photograph and put an arrow to where the front of the Beauregard's bow was when she first stranded now.

A Over here. It doesn't write on there very well I don't know if that's the right angle or not, but she was in there.

Q With her bow right up against the tanker?

A Yes, that's how I remember it, yes.

Q Captain, the circumstances under which the RB 13 and the other Dominican Navy tugs were in the area

available to be used for this effort, did they just happen to be in the area or what's the background of that?

A No, I think they're stationed there. We had always used one or two of them docking and undocking there.

Q As a regular course?

A Yes. They're the only tugs available.

Q Would you, on this Exhibit 1, take a pen and draw in the angle of your anchor chain?

A It must have been like this.

MR. MALOOF: What was that comment?

THE WITNESS: It must have been as I'm putting it here.

MR. DeORCHIS: The witness draws a line with a little anchor at the end of it.

Q Now, between the time that you were aground

with the bow and the time that the tug boat took the line, between those two periods of time did that bow move in any way?

A Not as I remember, no.

Q. Then the tug boat took the line, would you tell us where the line was in relation to the ship and the tug boat?

A Well, the line was made fast on the starboard quarter of the ship to the stern of the tug boat.

Q Would you take your pen now and draw a line from the starboard quarter of the ship in the direction that the tug boat had its purchase on it?

A I'm not too sure of the angle but --

MR. MALOOF: What was that comment?

THE WITNESS: I'm not too sure of the angle.

MR. MALOOF: You have to speak up. I want to be sure the reporter gets those comments.

MR. DeORCHIS: To the best of your recollection.

The witness has drawn a little line.

Q Is this little object here supposed to be the tug boat?

A Yes.

MR. DeORCHIS: The witness writes "tug".

Q Captain, what was the reason for the tug boat taking a line on your starboard quarter?

A To keep the stern from swinging further ashore and try to pull us out this way.

Q You are indicating towards the east?

A Yes, to pull us back into the channel, that means.

Q At this time, from which direction were the swells coming?

A At this particular time they were from the eastward, I would say.

Q Was there any wind at the time?

We're talking now about the time your tug had made fast.

A No, as I remember, the wind moderated quite a bit by then, but the swell was still there.

Q What was the size of the swell at that time?

A Oh, a good 15 feet.

Q Coming from an easterly direction?

A Yes.

Q Were you the one who requested the tug to take this line?

A Yes, sir.

Q Did you do that through the pilot?

A Yes, sir.

Q Why did you do it through the pilot?

A Well, because I couldn't speak their language and he could.

Q In asking the tug to take this line on your ship, did you consider the possibility that with those swells the line might part?

A Oh, yes, whenever you run a line to a tow boat there is a possibility it might part.

Q Did you consider that if the line parted your vessel might go into a worse position?

MR. MALOOF: Same objection, to form.

MR. DeORCHIS: Answer the question.

A Yes, sir, I did.

Q Was that a risk that you took intentionally?

MR. MALOOF: Objection to the form.

A Yes, I would say so.

MR. MALOOF: Leading questions.

Q What happened when the tug started to pull?

A She started to come off. She went astern a little bit and the stern started to swing to the eastward back into the channel.

Q When the vessel started to come off, did the bow clear the wreck?

A Yes. It went astern a little bit.

Q And then the line parted?

A Yes, sir.

Q From the time that the line parted and the bow of the Beauregard cleared that wreck, thereafter did the Beauregard move westerly?

A Yes, sir.

Q And during the time that she moved westerly, did the bow ever come free from the ground?

A No, sir.

Q When she finally came to rest, would you show

us on this Exhibit 1 where she came to rest?

A You want me to letter that?

Q Want to letter it B?

A Okay.

Q Were you on board the vessel at all times during that period of time from when she first grounded at position No. A until she came to rest at position B?

A Yes, sir.

Q During that period of time from A to B, to the best of your recollection, was there any pounding of the bottom by the vessel?

A I don't remember it.

Q Is it customary in maritime practice that if a ship hits the bottom that an entry be made in the log?

MR. MALOOF: Objection. Now you are making an expert out of him. Refer to his own custom, please.

MR. DeORCHIS: I am asking you as a master.

Q In the merchant marine and based on your experience in the practice of the merchant marine in the United States, is it a practice for masters that when the bottom of the ship hits the ground an entry should be made in the log book?

A Yes, sir.

Q During the overall effort to free the Beauregard, not only that day but the next day and so on, did other lines part?

A Yes, sir.

Q The lines that we've been talking about, are these wire ropes or are these lines made of fibers?

A Well, one was a wire which we used later on to the Dominican frigate, but the rest of them were rope.

Q The wire, was that like a wire rope?

A Yes, sir.

Q Was that wire rope in comparison to the lines it was used with the tug, was that a stronger or a weaker one?

A Oh, many times stronger.

Q What's the purpose of the wire rope on a ship?

A Well, that particular wire is what we call an insurance wire, in case the vessel is disabled at sea and has to be towed or we have to tow another vessel.

Q What was pulling on that insurance wire when it broke?

A The Dominican frigate. I forget its number. I can look it up. It's in the log book.

Q Here we are.

A I see two numbers here. It's confusing. 402 -- I better look in the log book.

It's the Dominican Republic frigate number 402.

Q Was the frigate at some size bigger than the tug boat or smaller than the tug boat?

A Larger.

Q After the line parted, you mentioned on direct that the tug boat then went to your port side and started to push.

A Yes, sir.

Q Can you tell us from what time to what time that tug boat pushed on May the 5th?

Use the log.

A That tug boat shifted to the port quarter at 1841 on the 5th, started pushing at 1842, stopped at 1843, resumed pushing at 1848, stopped 1908 and resumed pushing at 1917 and ceased pushing at 1940.

Q Did you then try anything else?

A Yes, then we asked the tug to come around to the starboard quarter again and take the line and lead it to the east breakwater.

Q Was the tug able to do that?

A Well, not immediately. He, he got a line in his propeller and he had to be towed in shore into the harbor to get that cleared. Then came back out again.

Q What time did he come out again?

A He was back at 2050.

Q Was there any further attempt made to put a line on that breakwater?

A Yes, sir. Well, he got the line over to the breakwater and then at 2145 he couldn't get it up on the breakwater for some reason.

Q Which tug are we talking about here now? Was it stillthe RB 13 or some other tug?

A Well, that was RB 13. There were two others around. There was the RB 12 and the RM 17 was standing by.

Q What was the RM 17 doing?

A He was standing by to assist at 2152 on the 5th and then, apparently, the RB 13 and the RM 17 were made fast to the starboard quarter. It doesn't say what time, though.

Q So you got a second line out on the starboard quarter?

A Yes, sir, with two tugs -- with two lines.

Q During this period of time, had the vessel

moved?

A Had it moved at all? No.

Q When were the first soundings taken that are shown in your log book?

A The first soundings shown in the log book were taken at 2015 on May 5th.

Q Up to that time, had there been any attempt to lighten the vessel?

A Yes. On 2320 we started discharging ballasts from number 6 deep tank to lighten vessel.

MR. MALOOF: What day?

THE WITNESS: That's on the 5th. That's after I received the guarantee from the tugs that they would continue pulling so she wouldn't go in any further as we lightened it.

Q Did the lightening of the vessel succeed at that point?

A No, sir.

Q Did there come a time when you put water into the vessel?

A Yes, sir. After the, after the tugs let go their lines at 0540 on the 6th, I ordered number 6 deep tank to be ballasted again to try to keep her from goin; further inshore.

Q When were the soundings taken the second time that are shown in your log book sketch?

A At 0600 on May 6th.

Q This is after your ballasting?

A Yes, sir.

Q Do you recall how much water you took on in that ballasting of number 6?

A No, not offhand.

Q Besides using the tugs, did you use your engines at all in trying to get off?

A Yes.

Q Was that successful?

A No, sir.

Q Do you have any entry in the log book about that?

A Well, at 2400 we, we have an entry here, 2400 on May 5th, "Various engine maneuvers as per bell book to try to float vessel," but I know that we used the engine well before that; in fact, the RB 13 was pulling on that line we were using the engines.

Q Did you eventually get a line to the breakwater?

A Yes, sir.

Q What was the purpose of putting a line on the

breakwater?

A We could heave our boring wench aft and keep the ship from going further ashore, keep a strain on it and, by keeping a constant strain on it she may have come off.

Q Did that succeed?

A No, sir.

You asked me when we first got a line on the --

Q Well, if you can tell me when you first got a line on the breakwater, fine.

A At 0702 on May 5th we had a line on the breakwater.

Q Did that cause a problem with the traffic going in and out of the harbor?

A Yes, sir. We had to slack it.

MR. MALOOF: I'll stipulate that, Mr. DeOrchis

Q Was there any more use of the tug to try to pull the ship from the stern?

A Yes, sir. You want the times on that?

Q Yes.

A Yes, on 2208 on the 5th, tug RM 17 was fast on the starboard quarter.

Q And she heaved on the line?

A Yes, sir.

Q Did that succeed in getting you off?

A No, sir.

Q You have an entry about bits, the bits on the breakwater, 0900 on May the 6th.

Could you explain what that entry means?

A Yes, the bits on the breakwater let go. That means they carried away from their mooring.

Q What are bits?

A Well, it's what you make lines fast to ashore. Well, on the ship, too.

Q When did Captain Mello arrive from San Juan?

MR. MALOOF: Give him a little help, Mr. DeOrchis. It's right in the log book.

A I've got the time he came aboard but he was out on the breakwater before that. 1100 on May 6th, Captain Mello was aboard, but I know he was talking to me from the breakwater before that.

Q How did you finally succeed in getting the Beauregard off the grounding?

A Well, we received more assistance from Puerto Rico Lighterage Company with two tugs which came from San Juan and by lightening the ship, popping out ballast and whatnot, we finally got her off.

Q At the time you lightened the ship, was there

still swells?

A Yes, sir.

Q How did you lighten the ship?

A By pumping out ballasts.

Q Did you consider at that time the lightening, the ship being aground, that you were going to pound?

A Yes, we figured she may pound.

Q And can pounding cause damage to the bottom of a ship?

MR. MALOOF: Objection unless he was underneath looking at it.

A Pounding can cause damage to the bottom of the ship, yes.

MR. MALOOF: I withdraw my objection.

Q id you ever consider lightening the ship by either discharging containers or throwing them overboard?

A Yes, but that didn't seem to be very practical

Q Why not?

A Well, on account of the swell running. We would have to -- well, if we used lighters, they would pound against the ship and also with them going up and down unhooking the containers it would be a problem in the barges.

Well, there's many reasons why we --

Q Does the ship have gear of its own for discharging and loading?

A That ship does.

Q What's that type of gear called?

A Well, we have gantry cranes, one forward and one aft, on that ship.

Q Could you describe them briefly, what they look like, what they do?

A Well, they, they run fore and aft on tracks and they also have what we call jibs that we raise that extend over the ship's side and then what we call a spreader that runs aforeships and we can pick up a box on the ship by using the spreader and then running it out over the side and lowering it on the dock.

Q Were those cranes used in any way in connection with freeing the ship from the grounded position?

A Yes. We extended the jibs and ran the spreader out, trying to rock her, you know, hoping that would free her.

Q The weight of the spreader on one side would cause her to roll that way?

A Yes.

Q And then the other way?

Did you have any container hooked up to the spreader bar at the time?

MR. KENNEDY: Objection.

MR. MALOOF: Objection, leading question, objection to form.

Q If you recall.

A I can't remember that. I don't think so.

Q How did the tugs from San Juan, how did they

get the ship off the strand?

A Well, in the first place, one of them -- we hove up our anchor and he, he shifted that anchor further out, and then, so we can heave on that at the same time they would heave with their lines.

Q Further out in which direction?

A Into the channel.

Q Toward the easterly or starboard side?

A Easterly, yes, sir.

Q You were able to put a strain on your own anchor, is that it?

A Yes, at the same time they were pulling.

Q So you have a double purchase?

A Yes, sir.

Q Did that succeed?

A Well, eventually, yes.

Q During this entire effort that was made to save the Beauregard and her cargo, was there cargo damaged in any way?

A No, I don't believe any of it was.

Q Was the Beauregard damaged?

A Oh, yes, the bottom was damaged.

Q Mr. Maloof asked you about language that you used in your report of May 12, 1967 relating to the

tug boat which parted the line and also about the language you used in your statement of October 6, 1969, again about the tug which parted the line.

Was it your intention to indicate that the tug boat had been negligent in any way?

A No, sir.

Q How long had you been on the Beauregard before this incident of May 5, 1967?

A Approximately two years, I would say.

REDIRECT EXAMINATION BY MR. MALOOF:

Q Captain, in your language in your statement of May 12 where you say, "In contrast to the Dominican Navy's assitance, the tugs Borinquen and Cabo Rojo of the Puerto Rico Lighterage Company did excellent work aiding us," you just said you didn't mean the tugs were negligent.

What did you mean by that language "in contrast"?

A Because the, the Puerto Rico Lighterage tugs are more powerful tugs. They're newer tugs, they're

better equipped, and they have more experienced men on them in this type of salvage work.

Q What you are saying is the Puerto Rico Lighterage Company did a better job than the Dominican Navy?

A Yes, they're better equipped.

Q Just answer yes or no.

A Yes, sir.

Q That means the Dominican Navy did a lesser job in quality, is that so?

A Well, yes.

Q That's what you meant by in contrast?

A Yes. It's two different situations.

Q It was a contrast?

A Yes.

Q That one did a good job and one did a job less than good?

A Well, I believe that the Dominican tug did as good a job as they were capable of, considering --

Q What you're saying -- I'm sorry to interrupt -- go ahead.

A Considering the equipment they had, they had old tugs, where the Puerto Rico Lighterage had almost new tugs, more powerful tugs, twin screw tugs, better equipment and lines, better communication as far as

radiotelephones are concerned, all the way around.

Q All the way around, the Puerto Rico Lighterage Company did a better job than the Dominican Navy?

A Well, sure, for those reasons.

Q Did the Puerto Rico Lighterage Company cause any lines to break?

A I believe so, yes. On 2127 on May 7th, tug Cabo Rojo stranded a towing line.

Q What did they do?

A They stranded a towing line; that is --

Q What happened then?

A That means the --

Q What day?

A On 2127 on May 7th.

Q What does that mean, sir?

A Well, if it was a three-stranded line, why one or two of the strands parted.

Q That comes from pulling it, doesn't it?

A Yes.

Q What was that answer?

A Yes.

Q Tell me, sir, is it easier for a tug to hold a ship steady to keep it in a safe position rather than to try to pull it off of the rocks, to act somewhat like

an anchor?

A Instead of -- you mean instead of attempting to get it off, you just hold it in position?

Q Yes, could it be used in that way, as a steadying force?

A Yes, if you desired that.

Q How far away is San Juan, steaming time, from Rio Haina?

A You want that from dock to dock or from departure to arrival?

Q From San Juan to the place of your disaster.

A Steaming time was 15 hours and 12 minutes from harbor entrance to harbor entrance.

Q Now, tell me, knowing what you knew about the Dominican Navy tugs, their inefficiency, their inexperience, their old tugs, why didn't you just use them to hold the Beauregard steady until the Puerto Rico tugs could come along?

A Because I was afraid the ship was going to go further ashore.

Q Even using tugs to hold it?

A Yes.

Q With the anchor and the tugs and the line to the breakwater?

A Well, the, the anchor wasn't doing too much good then. There was only a short lead on it and it was leading aft.

Q How many tugs are permanently stationed in Rio Haina?

A I wouldn't know that.

Q You mentioned it before.

A Did I? I know there's --

Q At least two?

A Well, yes, but --

Q You had one, the RB 13, didn't you?

A Well, there were more than that.

Q You had one at a time, didn't you?

A Yes, at that time.

Q Why didn't you just let the RB 13 steady the ship until the RB 12 could come alongside and also take a line? She was right in Rio Haina.

A I think, as I remember, the RB 13 was the only one that had steam up, and it would be a good many hours

Q How many hours?

A I haven't the least idea.

Q You didn't investigate that, did you?

A No, I had taken the word of my agent it would be some time before the other ones could come out.

Q You have just told the Court, through this testimony under oath, that you thought there was a possibility of that line breaking and this ship becoming a total loss ship and cargo but you wouldn't wait a few hours for another tug; is that your testimony under oath?

A Yes, because I --

Q That's it, yes or no. That's the testimony.

as you called it, was it the wire?

A No, that was the frigate I had on the --

Q This was a Manilla rope you used, right?

A Yes.

Q And you told this little inefficient tug to pull away, didn't you?

A I wouldn't say it was inefficient.

Q With an inefficient, uneducated crew?

A I don't know.

Q I thought that was what you just testified to under oath about the Dominican Navy.

MR. DeORCHIS: Where did he do that?

MR. MALOOF: Just now he was excusing them from negligence because they weren't smart enough to be negligent.

MR. DeORCHIS: I don't remember any testimony except for Mr. Maloof.

MR. MALOOF: Let's go over it again. I don't understand it either.

Q Obviously you are saying the Dominican Navy didn't do as good a job as the Puerto Rico people did, that they were inferior. Why?

Let's have it again. Obviously there's a misunderstanding.

A Well, they have older equipment, older tow boats. They're not experienced in that type of work, at least I don't think they were.

Q You're not sure?

A Whereas the Puerto Rico Lighterage, they go out on salvage work quite frequently. There's better communication between the Puerto Rico Lighterage tugs and --

Q And the Dominican Navy has smaller tugs?

A Well, I wouldn't say they're smaller, but they're no doubt, lesser horsepower and older.

Q What was the horsepower of the Puerto Rican tugs?

A I think they're 2500.

Q Didn't the Dominican Navy have one 5500?

A Gee, I wouldn't know that.

Q What? You didn't know that?

A That may have been the frigate.

Q So that will you continue your answer, please? Is it they didn't know how to use these tugs or what?

A Well, as I understand it, they're more used to docking and undocking ships rather than doing salvage work.

Q Wouldn't there have been more reason to use two of the tugs instead of one, instead of a line breaking?

A Well, you must understand when a ship is aground like that, you've got to operate fast to keep her from swinging further in. You're just going to sit there and --

Q You just told us there was a risk of a total loss. That's what I understand.

A Yes, that's right.

Q So you take one of these little tugs, and not wait a couple of hours for another one to come --

A That was to stop the risk.

Q Which would have lessened the risk of a total loss from a line breaking, wouldn't it? You would have another line attached?

Am I making fair comments, captain? If I'm not, please explain why not.

A Well, the idea was to get something going as soon as possible.

Q Captain, I suggest to you that when you sent the RB 13 to the starboard quarter of the Beauregard and told it to pull away, you intended that she should and could have pulled the Beauregard off of the rocks; that

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was your intention, wasn't it?

A Yes, I tried to get the ship out.

Q And if it was done right, that's what would have happened?

A Well, you've got to take and consider the weather, weather conditions. We tried our best to get her off.

Q But the weather conditions you knew about?

A Yes.

Q Everybody knew about them?

A But we couldn't sit there, let the ship drift further inshore. We had to do something. The stern would have swung right around.

Q Right, if nothing were done, she would have come right around to where she did end up?

A Yes, that's true. Maybe worse. I didn't know what was in there.

136-A

Q You knew there was a tanker there and that was danger?

A Yes, but while she was swinging around, what was in there -- suppose she swung around and capsized?

Relevant Portions of the Deposition Upon Oral Examination of Efigemo Torres

TORRES - DIRECT, BY KENNEDY

5-6

DIRECT EXAMINATION

BY MR. KENNEDY:

Q Mr. Torres, by whom are you employed?

A By the Marine of the Dominican Republic.

Q Would the Marine of the Dominican Republic also be called the Navy?

A Yes, he belonged to the Navy.

Q What type of work do you do for the Marina de Guerra?

A He is the pilot of the harbor.

Q For how many years have you been a pilot employed by the Navy?

A On February 16th he has been twenty years with the Navy doing this work.

Q In what city are you presently employed?

A He is living in Pedrnales (phonetic) and he works in the port of Cabo Rojo.

BY MR. KENNEDY:

Q For how many years have you been employed as a pilot in Cabo Rojo?

A I have eleven months working in Cabo Rojo as pilot.

Q And, prior to employment in Cabo Rojo at which port were you employed?

A I work for four years in the port of Barahona.

Q Prior to that time where did you work?

A I working about eight years in the port of

6+8

Heina.

Q Were you employed as a pilot in the port of Heina in May of 1967?

A Yes, I was.

Q For how many years prior to 1967 were you a pilot at Heina?

A I came to Heina on 1962.

Q I hand you a chart which has been marked in a previous deposition as defendant's exhibit one and ask if apart from some of the writing on it you can identify it?

A Yes.

Q And, is this chart generally an accurate chart of the port of Rio Heina as it was in May of 1967?

A Yes, it is.

Q Did there come a time in May of 1967 when you were employed as a pilot on a vessel called the BEAUREGARD?

Q Were you employed as a pilot on a vessel called the BEAUREGARD in May of 1967?

A Yes, I was.

A I work in this ship as a pilot on that date.

Q And, was the ship at the port of Rio Heina?

A No, the ship was to arrive about six P.M.

Q At Rio Heina? Is that correct?

A Yes, the ship was to arrive that day around

8, 9, 11 & 14

Q At whose request did you board the BEAUREGARD as the pilot?

A I was requested by the ship agent to go to the ship.

Q And, was it a Sea-Land person or someone from Sea-Land who instructed you to board the vessel as a pilot?

A As I was leaving somebody in the name of Manolin request me to go to the ship.

Q What was Manolin's position with Sea-Land at that time?

A I can say he was the second of the company over there. Sometimes he received the documents, the ship's documents, and he handled the operation as an agent in the port.

Q Did Manolin tell you that you must go to the ship or did he tell you that you must bring the ship in?

A He told me that I have to go to the ship to enter the ship because they requested the personnel for six P.M.

Q Would you describe for me the condition of the sea at the time you made your first approach?

A We have heavy seas and as we saw that we couldn't follow we return . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE TRANSLATOR IN SPANISH.

A We return back again.

Q From which direction were the heavy seas?

A We have heavy sea from the east.

Q Was there any wind at all on the occasion of this first approach?

A We have winds, rains and the heavy seas.

Q From which direction was the wind coming?

A We have east winds.

Q At the time you made your first approach were you using any navigational aids?

A No, only our sight.

Q What navigational aids were available at the port of Rio Heina in May of 1967?

THE INTERPRETER:

Would you repeat your question?

Q What navigational aids were available at the port of Rio Heina in 1967?

A I can say that nothing because we didn't have orientation lights for helping us.

Q Did the ship enter the harbor on the first approach?

A No, in any way.

Q Why didn't it enter the harbor?

A Because the weather blocked the mouth of the port and we turned back.

Q Who gave the order to turn the ship back?

A The pilot and the captain work together and as we saw that the weather blocked the mouth of the port we decide to turn back.

WHEREUPON, THERE WAS A BRIEF OFF THE RECORD DISCUSSION.

Q Did you make a second approach? And, answer yes or no.

A Yes.

Q Did you have any conversations with anyone prior to your making the second approach?

A He said . . .

MR. NELSON:

No, say I.

A I said I talked with somebody on board before making the second approach.

BY MR. KENNEDY:

Q Aboard or not aboard?

A Yes, I talk.

Q With whom did you have a conversation?

A With Mr. Collie.

Q Who is Mr. Collie?

A Mr. Collie was at that time the general manager of the company, Sea-Land.

Q And, where was Mr. Collie at the time you had this conversation with him?

A He called me on the ship.

Q How did he call you?

A By the frequencies on the ship.

Q By frequency do you mean a radio phone?

A Yes, frequency means frequency thirty-eight through the radio of the port commander.

MR. NELSON:

Mr. Translator, ask him the frequency number again.

A At that time the frequency was the twenty-seven thirty-eight.

BY MR. KENNEDY:

Q Did you call Mr. Collie or did Mr. Collie call you?

A Mr. Collie called me on board.

Q And, what did Mr. Collie say to you?

A He said that the weather was clear and that I

should try to enter the ship.

Q Did you reply to Mr. Collie?

A Yes, I reply.

Q What did you say to him?

A I answered that we were going to make the second approach.

Q And, what did Mr. Collie say to you?

A He told me to try to hurry in view of the better weather.

Q Can you recall anything else about this conversation that you had with Mr. Collie?

A No, because immediately after we proceed to the second approach and I didn't talk again with him.

Q Did Mr. Collie give you a reason for trying to come in the second time?

A Yes, because he pointed out that we should hurry because of the better weather at that moment.

Q How many ships had you piloted for Sea-Land at Rio Heina prior to May of 1967?

A Many, because I was a pilot of Sea-Land as they began to operate over there.

Q When you were bringing in Sea-Land vessels as a pilot at Rio Heina did Collie generally communicate

with you from the harbor master's office?

A No, sir, that never happens.

Q It never happened before this time?

A No, sir.

Q Would you have made the second approach at the time you did had it not been for the radio phone conversation that you had with Mr. Collie?

A Perhaps, because Mr. Collie repeats that we have better weather and we should try to enter the port.

Q Did Collie's conversation with you on the radio phone influence your decision at this time?

A Yes, the conversation with Mr. Collie influenced me to make the second approach.

Q I don't think you understand my question. I am asking you if the fact that you had the conversation before you left the dock, and I am referring now to the conversation with Manolin, influenced you in making your decision to attempt the second approach.

A I said before that not the conversation with Manolin because at that moment was the conversation with Mr. Collie, that I talk only with Manolin as I was leaving the harbor, the dock.

Q Would you tell us what happened in making your second approach?

A As we were approaching again the entrance . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A . . . the ship was going slow ahead.

A But, as we arrive to the entrance of the port . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A . . . again the wind fight the ship . . .

A . . . but without fog.

WHEREUPON, THERE WAS A BRIEF OFF THE RECORD DISCUSSION.

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A We have heavy seas . . .

A . . . and the river current . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A Have it in mind that the ship have a height,
A . . . a lot of height.
A The ship began to incline . . .
A . . . fall off to the left.

WHEREUPON, THERE WAS A BRIEF OFF THE RECORD DISCUSSION BETWEEN MR. NELSON, MR. FUSTE AND MR. DeORCHIS REGARDING TRANSLATION, WHEREIN THERE WAS A GENERAL AGREEMENT THAT THE PROPER TRANSLATION IN THE ABOVE ANSWER WOULD BE THE WORDS "FALL OFF". AT THE END OF THIS OFF THE RECORD DISCUSSION THE REPORTER READ BACK THE ENTIRE ANSWER TO THE QUESTION "WOULD YOU TELL US WHAT HAPPENED IN MAKING YOUR SECOND APPROACH" AND THERE WAS GENERAL AGREEMENT AMONG COUNSEL THAT THE TRANSLATION APPEARING ABOVE WAS ACCEPTABLE.

Q Would you continue telling us what happened as you were making the second approach?

A As the ship began to fall off on the left we turn the rudder hard right.

Q Did the ship respond to the hard right rudder?

A We command half ahead, hard right, . . .
A . . . but the ship didn't answer, didn't obey.

Q Did I understand you to say that in addition to calling for a hard right rudder there was an order

given for half ahead?

A Yes.

Q For what purpose did you give a half ahead order?

A In order to allow the ship to enter the channel, to follow the channel.

Q Why would this help?

A Yes, because normally the ship obey when you turn the rudder left or right.

Q How would the increase in speed from slow ahead to half ahead effect the ship in this circumstance?

A Because the operations of the ship, half ahead means half of the force of the ship.

Q Were you trying to go faster?

A No, in any way, only to recover the proper direction of the ship.

Q Did the ship respond at all to the hard right rudder, half ahead?

A No, sir, it didn't respond.

Q What happened then?

A We stop the machines.

Q Did you do anything else?

A Yes, we order to drop the anchor on the starboard.

28,29,30

BY MR. KENNEDY:

Q And, then what happened?

A We order full astern.

Q And, what effect did this have on the ship?

A The ship go ahead and the ship scrape the end of the breakwater.

Q What happened then?

A I gave three blasts requesting the help of the tugboat.

Q In describing the conditions which affected the ship you mentioned the wind and the current. Was the current any stronger than you had anticipated it would be as you were making the second approach?

A No, the river had this normal current except when is going flood.

Q Was the river in flood at that time?

A No, it wasn't.

Q About how long did it take before this tug that you mentioned arrived?

A In ten minutes the tugboat has the line.

Q What did it do with the line?

A It began to pull the ship.

Q Whose line was it?

A The line was from the shipboard, or the line came from the ship.

Q Where did the line run from on the ship?

Excuse me?

Q Where did the line come off the ship?

A From the stern, from the starboard side.

Q Was the tug able to remove the vessel?

A Yes, but the line broke.

Q Did you see the line just at about the time that it broke?

A Yes, I saw this.

Q What was its condition then, was it slack or was it taut?

Q Could you see the rope that was running from the ship to the tug?

A Yes, from the bridge to the stern because I was on the bridge.

Q And, at about the time it broke or parted could you tell whether it was slack or taut?

A Yes, because the -- how do you say . . .

MR. NELSON:

The tugboat.

MR. FUSTE:

The tugboat.

A . . . the tugboat was pulling.

MR. KENNEDY:

You haven't answered my question.

MR. DeORCHIS:

Yes, he answered the question fine.

MR. NELSON:

No, because he only got to the was it tight and then he answered, he interrupted and said yes. He never gave the alternative, was it tight or slack.

MR. DeORCHIS:

His answer was yes because the tugboat was pulling and he put his hand like that.

MR. KENNEDY:

Well. do we understand that his answer was . . .

MR. DeORCHIS:

Ask him another question.

BY MR. KENNEDY:

Q Was the rope tight?

A Yes, of course, if it wasn't tight it wouldn't have broken.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT AMONG COUNSEL AS TO THE PROPER TRANSLATION OF THE SPANISH WORDS OF THE WITNESS.

Q From the time that the tug began to pull up to

the time that it broke could you see any slack in the line?

A There was no slack in the line. It was always tight.

Q Do you know where the line parted? That is, did it part near the center, did it part near the tug or did it part near the ship?

A The line broke in the eye of the ship where the line comes out of the ship.

Q When the line parted did the ship's position with respect to the breakwater change any at all?

A Yes, because during the tugboat was pulling the ship the ship go, went back.

A Yes, but when the line broke the tugboat try to push the ship.

A They recover the -- the tugboat recover the line and then he try to push the ship, the tugboat.

BY MR. KENNEDY:

Q You said that the tug arrived about ten minutes after the vessel made contact with the breakwater. Were there any other tugs available at the same time that could have rendered assistance to the ship?

A No, there were not any other available in the port of Heina.

Q Would it have been safer to leave the ship where it was and wait for other tugs or larger tugs to come to its aid?

A Not in any way. Impossible.

Q Why?

A Because with the help, the aid or help of the tugboat, the ship was still in position to be rescued, to go outside.

Q What would have happened to the ship if you hadn't attempted to remove her with the tugboat?

A In any way the ship was going to hit against the rocks.

Q That is if nothing was done? Is that correct?

A Yes.

Q After the line parted in which position did the ship wind up?

A The stern swung to the west.

Q Did the bow move at all?

A No, the bow more or less stayed in the same position because she have the anchor down at that time.

Q Did the whole ship finally move over to the west?

THE INTERPRETER:

Did the . . . ?

BY MR. KENNEDY:

Q Did the whole ship finally or eventually move over to the west?

A Yes, more or less, but the bow was in that

direction.

Q I refer you to the chart that you identified earlier today.

A Yes.

Q There are two ships drawn in or what appear to be ships toward the bottom of the chart in the center. Do you see them?

Q Does the first ship, the one over to the right which has the writing 357 degrees more or less depict the ship's position just after the stranding?

A In the bow, yes, but not in the stern.

Q Was the stern further to the east or further to the west?

A The stern was more to the east.

Q Would you look at the second position shown on the chart, that is the one with the numeral 015?

A Yes.

Q Does this position more or less show the ship when it finally came to rest?

A Yes, this is the position, more or less.

Q Had the tug not been used would the ship in your opinion have moved into the second position?

THE INTERPRETER'S TRANSLATION OF THE ABOVE QUESTION TO THE WITNESS WAS MADE WITH THE ASSISTANCE OF COUNSEL.

A No, because the tugboat can't enter this place.

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A Because the tugboat couldn't turn around because they have no water.

MR. KENNEDY:

I am not too certain he understood the question.

BY MR. KENNEDY:

Q If the first tug had not been used would the ship have moved over to its second position, anyway?

THE INTERPRETER:

Do you mean the first tug?

THE INTERPRETER'S TRANSLATION OF THE ABOVE QUESTION TO

THE WITNESS WAS MADE WITH THE ASSISTANCE OF COUNSEL.

A Affirmatively, yes.

BY MR. KENNEDY:

Q As the ship was moving to the west could you tell whether it was making any contact with the bottom below?

A Still in the first position . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A . . . in the first position the ship couldn't make contact with the bottom.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT AMONG COUNSEL AS TO THE PROPER TRANSLATION OF THE SPANISH WORDS OF THE WITNESS.

Q In the first position was any portion of the ship making contact with the bottom or sides or any place?

A Yes, but only in the bow.

Q As the ship moved did it then begin to make contact with the bottom?

A As the ship began to move from this position and the tugboat couldn't push him . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A . . . so the ship began to make contact with the bottom.

Q How could you determine that it was making contact with the bottom?

A Because we feel that the ship was hitting, making contact.

Q How many years experience did you have at Rio Heina as a pilot before May of 1967?

A I arrive to Heina in November 1962.

Q Is it obligatory for a ship such as the BEAUREGARD to use a pilot at Rio Heina?

A Yes, the ships in the ports of the Dominican Republic, they use a pilot according to the laws of the Dominican Republic.

Q In your five years of experience before May of

'67 had you guided other ships like the BEAUREGARD in and out of that port?

Q In your five years of experience at that port had you guided, had you piloted other ships like the BEAUREGARD in and out of that port?

A Even bigger ships than the BEAUREGARD but not of the height of the BEAUREGARD.

Q Have you guided other ships into Rio Heina under conditions which were worse than the conditions of May 5, 1967?

A We have -- I have pilot other ships of the same company but not with it in this condition, weather conditions.

Q Have you entered many ships similar to the BEAUREGARD under conditions which were equal or even

worse conditions?

A I have pilot -- yes, I have pilot similar ships but not ships with the height of the BEAUREGARD.

Q In piloting the BEAUREGARD into Rio Heina or into Heina did you consider, did you take into consideration, the height of the ship?

A The first kind of this ship to enter this port was pilot by me.

Q Had you ever piloted the BEAUREGARD before?

A Many times.

Q Had you had any difficulty with the BEAUREGARD going into Heina?

A No, never.

Q When the ship grounded by the bow, when the ship grounded at the bow, did it remain in a fixed position until the tugboat came?

THE INTERPRETER'S TRANSLATION OF THE ABOVE QUESTION TO THE WITNESS WAS MADE WITH THE ASSISTANCE OF COUNSEL.

WHEREUPON, THERE WAS A BRIEF INTERRUPTION AND RECESS.

BY MR. DeORCHIS:

Q When the ship grounded by the bow did it remain in a fixed position until the tugboat came?

A Could be . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A In ten minutes the ship could turn -- move a little, but the tugboat came and have the line, and receive the line.

THE ABOVE ANSWER WAS MADE WITH A LITTLE DIFFICULTY IN TRANSLATION.

Q Mr. Torres, I am trying to ask you simple questions so that you can answer them yes or no. Now, my question was after the ship struck by the bow and until the time that the tugboat came did the ship remain in the same position?

A We gave full steam and the ship . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A . . . the ship moved a little bit and then the tugboat came and sent the -- took the line.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT AMONG COUNSEL AS TO THE PROPER TRANSLATION OF THE SPANISH WORDS OF THE WITNESS.

Q Were you concerned after the bow struck that the ship was in danger?

A Yes, of course, and that's why I called the tugboat.

Q What was the number or name of the tugboat that you called? What was the number or the name of the tugboat that you called?

THE INTERPRETER'S TRANSLATION OF THE ABOVE QUESTION TO THE WITNESS WAS MADE WITH THE ASSISTANCE OF COUNSEL.

A RP-13 under command of Commander Rojo.

Q Before the tugboat arrived was only the bow of the BEAUREGARD touching the rocks?

A Only the bow.

Q Was the stern of the BEAUREGARD in deep water?

A Affirmatively.

Q Was the tugboat given an order to take a line from the ship?

THE INTERPRETER'S TRANSLATION OF THE ABOVE QUESTION TO THE WITNESS WAS MADE WITH THE ASSISTANCE OF COUNSEL.

A Yes.

Q And, was the tugboat told to pull from the stern of the BEAUREGARD?

A Yes, sir.

Q In giving those directions did you consider that there is always a possibility that a line might break?

MR. KENNEDY:

I object to the form of the question.

A Not -- not of my part because I was in the bridge and the operation of the line was in the other part.

Q Had you had experience before with tugboats trying to free a ship as big as the BEAUREGARD?

A No, sir, because it never happens before.

Q When the tugboat was pulling from the stern

was your engine also going astern?

THE INTERPRETER'S TRANSLATION OF THE ABOVE QUESTION TO THE WITNESS WAS MADE WITH THE ASSISTANCE OF COUNSEL.

A Full astern.

Q Just before the line broke did the bow of the BEAUREGARD start to come off? Just before the line broke did the bow of the BEAUREGARD start to come off?

THE INTERPRETER'S TRANSLATION OF THE ABOVE QUESTION TO THE WITNESS WAS MADE WITH THE ASSISTANCE OF COUNSEL.

A Yes, sir, the ship was leaving -- coming out, back out of the breakwater.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT AMONG COUNSEL AS TO THE PROPER TRANSLATION OF THE SPANISH WORDS OF THE WITNESS.

BY MR. DeORCHIS:

Q Before the tugboat started to pull and before you had your engines full astern was the bow moving?

A We appreciate as the tugboat was pulling that the ship with draw from the end of the breakwater.

Q But, my question was simple. Translate that. Was the bow in a fixed position before the pulling began?

A As the ship went against the breakwater the ship began to move because we gave full astern.

Q See, you are not listening to my questions. The question is did the bow remain in a fixed position before the pulling began?

THE INTERPRETER'S TRANSLATION OF THE ABOVE QUESTION TO THE WITNESS WAS MADE WITH THE ASSISTANCE OF COUNSEL.

A Yes, it was in a fixed place.

Q How long was the tugboat pulling . . . ?

WHEREUPON, THERE WAS A BRIEF INTERRUPTION AND RECESS.

BY MR. DeORCHIS:

Q How long was the tugboat pulling before the line parted?

A Eight to ten minutes.

Q Was the bow still aground after the line broke?

A As the line broke the ship was going back.

Q After the line broke was the bow still aground?

A It began, the bow began to be free because the ship began to move back.

Q Was the bow . . .

MR. NELSON:

No, he didn't get your full answer, something about it going back evenly to the side. I don't know whether that is good or bad but we ought to get the whole answer.

MR. DeORCHIS:

That is not the answer to the question, anyway.

BY MR. DeORCHIS:

Q Was the bow still touching the bottom, still touching the bottom after the line broke?

A No, the ship had left the blocks.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT AMONG COUNSEL AS TO THE PROPER TRANSLATION OF THE SPANISH WORDS OF THE WITNESS.

Q After the ship left the blocks was it still

touching the bottom?

A No, the ship began to touch the bottom when they move to the second position.

MR. NELSON:

No, when they moved close to the second position.

THE INTERPRETER:

Close to the second position.

BY MR. DeORCHIS:

Q Do you know what caused the line to part? Do you know what caused the line to break?

A No, sir, I don't know because I was in the bridge and I couldn't know the reasons why.

Q Who was on the bridge besides you at the time the line parted?

A The captain and one officer.

Q Who was at the wheel?

A A marine, but he doesn't remember. A sailor, but he doesn't remember.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT AMONG COUNSEL AS TO THE PROPER TRANSLATION OF THE SPANISH WORDS OF THE WITNESS.

Q When the line parted was there any criticism from anybody on the bridge? Any criticism of the tugboat from anybody on the bridge?

A No, because it wasn't the fault of the tugboat because they were pulling on it.

Q What was the state of the sea at the time that the tugboat was pulling?

A The sea was high or they have heavy seas because they have wind, because there was wind.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT AMONG COUNSEL AS TO THE PROPER TRANSLATION OF THE SPANISH WORDS OF THE WITNESS.

WHEREUPON, THERE WAS A BRIEF OFF THE RECORD DISCUSSION.

BY MR. DeORCHIS:

Q Sir, I asked a simple question which can be answered yes, no, I don't know, and the question was in pulling, when the tugboat is pulling in heavy seas do lines frequently break? Yes, no or I don't know.

WHEREUPON, THERE WAS QUITE A LENGTHY DISCUSSION BETWEEN

53,54

A It is related to the position of the tugboat because if you gave him a thin line or an old line . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A . . . if this is a heavy tugboat, a strong tugboat, he could break the line.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT AMONG COUNSEL AS TO THE PROPER TRANSLATION OF THE SPANISH WORDS OF THE WITNESS.

Q On the bridge at the time the line broke was there any criticism of the tugboat?

MR. NELSON:

You asked that question before.

MR. DeORCHIS:

No, I said before the people on the tugboat.

A No, I didn't listen or it wasn't reported to me.

Q You were hoping the line would not break? Is that correct?

A Affirmatively.

Q But, you knew, based on your experience, that lines frequently break in heavy seas?

A My answer was yes, according to the condition of the line and the . . .

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A . . . and according to the force of the tugboat.

Q And, how about the condition of the sea itself?

A I said before that we -- there was wind and that we have heavy seas.

Q And, in heavy seas is there more risk that a line might break?

A Yes, because when the tugboat is pulling the ship that is in a fixed place the line is -- how do you say -- tight, and is completely different, it is different when the ships are moving.

56,59,60

Q When you approached the second time was the decision to go in the joint decision of you and the captain?

A Yes, because as you remember when Mr. Collie called me he said that we really should try to go ahead because of the better conditions.

Q When you approached the second time could you see the mouth of the port?

A Yes, because there was wind but no fog.

Q From what direction was the wind?

A From the east.

Q At what speed were you approaching?

A We came slow ahead in coming into the port.

Q At slow ahead as you approached the second time was the wind affecting your navigation?

A No, because as we came to the mouth of the port there was no fog but we have wind, there was wind, the wind came.

Q Did the wind surprise you?

Q The question is when you approached the second time did the wind that came up . . . ?

Q . . . did it surprise you? Yes or no.

A Yes, we were surprised.

Q Is there a current outside the breakwater?

A The normal current of the river.

Q Does that current run from east to west?

A It cross two or three times the river but when go outside is more or less west oriented.

61,62

Q How far from the breakwater do you normally find this current?

A The current run normally at the end of the breakwater.

Q This time as you approached the second time did you find that the current was at a different place?

A I don't remember because as we came in the wind surprised us and threw the bow to the west.

Q Do you remember being interviewed by Mr. Kennedy sometime ago?

A Yes, sir.

Q At that time did you sign a statement for Mr. Kennedy?

A Yes, sir.

Q Did you mention to Mr. Kennedy the conversation you say you had by radio with Mr. Collie?

A He didn't ask me.

Q Do you remember Mr. Collie and I interviewing you some time ago?

A Yes, sir.

Q At that time did you mention to either Mr. Collie or myself that you had a conversation with Mr. Manolin?

A You didn't ask me.

Q Did you tell me that you had a radio telephone conversation with Mr. Collie?

A When?

Q When I talked to you.

A No, I didn't say that to you.

64,167

Q Do you know where Mr. Collie is now?

A No, I don't know, but I saw in the newspaper that he died.

Q Do you know where the tugboat captain of the RP-13 is today?

A According to my knowledge he is working in the port, in a tugboat in the port of Santo Domingo.

Q Do you know his name?

A The name, the family name is Rojo.

Q What was the number of the tugboat whose line broke?

A RP-13.

Q And, who was the captain of that boat?

A Mr. Rojo.

Q Mr. Torres, I asked you whether you had piloted into Rio Heina many ships similar to the BEAUREGARD under equal or even worse conditions?

A We have enter Sea-Land's ships but not with this weather.

Q Mr. Torres, is that your signature at the bottom of the statement?

A Yes, it is.

Q Is that the statement that you gave me in September of 1972?

A Yes, in the presence of Mr. Collie.

Q Do you affirm what you said in that statement?

A If I had been in the circumstances I would have denied it.

68, 69

Q You would have denied what?

MR. KENNEDY:

Would you show him the statement?

A Mr. Collie called me to say this.

Q Well, is there anything in this statement that you want to deny now?

A Mr. Collie had a great deal of influence during his life.

BY MR. DeORCHIS:

Q Mr. Torres, the question is not about Mr. Collie. The question is about you. Do you wish to deny anything in this statement? Tell him the question is not about Mr. Collie. The question is about you.

A Mr. Collie called me to say this to you and I do -- I did this on his influence, because of his influence.

Q The question is is there anything in this statement which you signed on September 28, 1972 which you wish to deny or which you say is incorrect?

A I have entered all kinds of ships but not with that ship with weather like this.

Q As I understand it you are referring to the statement in paragraph one. Is that correct?

A Yes.

Q Now, would you tell me in paragraph one which part of that paragraph you say is incorrect now?

A This is the part of the declaration that I want to deny, that I wish to deny: I am telling the truth and I made a similar declaration to the commander of the port.

Q You made what similar declaration?

A I declare to the commander of the port what happened exactly and this is on the file with the commander of the port.

Q Mr. Torres, I still don't understand what part of number one you say is incorrect What words in that number one paragraph are incorrect?

A The words that I explained that I enter ships in worse conditions, similar or worse conditions.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT AMONG COUNSEL AS TO THE PROPER TRANSLATION OF THE SPANISH WORDS OF THE WITNESS.

Q Did you enter ships under conditions which were similar but not worse?

WHEREUPON, A TAPE RECORDING WAS REPLAYED SEVERAL TIMES.

A With this kind of wind and heavy seas I could not enter a ship.

WHEREUPON, A TAPE RECORDING WAS REPLAYED SEVERAL TIMES. AFTER THE SECOND REPLAYING OF THE TAPE MR. FUSTE AND MR. NELSON AGREED ON THE FOLLOWING ANSWER:

A With this type of wind and these kind of heavy seas you cannot enter a ship.

BY MR. DeORCHIS:

Q The conditions that you are referring to are what conditions?

A From the very beginning I said the stationary weather that was going through.

MR. KENNEDY:

Mr. Interpreter, should the expression stationary weather be interpreted as stationary front?

WHEREUPON, THERE WAS A BRIEF OFF THE RECORD DISCUSSION

THE INTERPRETER:

Yes, this is the correct word.

BY MR. DeORCHIS:

Q What do you mean by stationary weather?

A That means for me many rains, many winds and fog that is going through, passing.

Q In between the rain and the wind and the fogs do you get periods of clear weather?

A Yes, of course.

Q When you gave up the first approach it was during one of these periods of bad weather? Is that correct?

A In effect because in the front of us all was dark and we have to turn back.

Q Is that because you couldn't see the mouth of the harbor?

A Yes, we couldn't see the mouth of the port and the beginning -- and the end of the breakwater.

Q And, the second time when you made the decision that you were going in it was because the weather had cleared momentarily?

A Affirmative.

Q But, just as your bow reached the entrance you were surprised by a gust of wind? Is that correct?

A Exactly. The wind come again but without fog.

BY MR.KENNEDY:

Q Mr. Torres, would you please explain why you gave the statement that Mr. DeOrchis has referred to if at least portions of it were not true?

A Mr. Collie called me before and talked to me to give such statement to one person coming to his office, to a person who was coming.

Q Did you discuss with Mr. Collie what would be contained in the statement?

A No, sir, I did not discuss the matter.

Q Why did you give a statement in the presence of Mr. Collie and Mr. DeOrchis if you felt that at that time at least portions of it were not true?

A Remember that Mr. Collie was a person of a lot of influence and that in our work we depend more from the companies than from the commander of the port.

Q Which companies are you referring to?

A Mr. Collie was the manager of the Sea-Land company.

Q When you referred to companies are you referring to steamship companies?

A Yes, I am referring to ship companies or ship agents, and sometimes they have a big influence with the government . . .

A . . . and you have to cooperate with them if they request such help.

Q Did Mr. Collie have any influence with the government?

A He was a man with a lot of influence with great consideration, but I cannot say exactly.

Q In answer to one of Mr. DeOrchis' questions you said just after the vessel's bow made contact with the breakwater she was in danger. Would you tell me what the danger was?

79,80,81,85

A The danger was that the ship couldn't go ahead, that the ship have to go east.

Q If the tug that was employed were not employed would the ship have remained where it was or would it have moved to the west?

A Yes, the ship would go to the west if they had not used the tugboat.

Q You said that when you made the second approach or just before you made the second approach that Mr. Collie had advised you that the weather had cleared and you did say also that the weather had cleared. Now, was it clear just at the entrance to the port or had the sky completely cleared?

A The fog has disappeared.

A They have the visibility of the port.

Q But, had the sky cleared completely or had the weather cleared completely or had it just cleared at the entrance to the port?

A The darkness was past but the clear time was at the -- the first part of the darkness was past, but at that time it was clear at the port.

Q Was there other bad weather moving in from the east which would eventually pass over the breakwater?

A Yes, affirmatively, but without fog.

BY MR. DeORCHIS:

Q You have testified that you were influenced by Mr. Collie.

A He has a witness to that effect.

Q Did you report to your superiors in the government at any time that Mr. Collie was influencing you?

A No, but in the presence of the commander of the port Mr. Collie called him to enter the ship.

Q That is when he called you on the radio? Is that correct?

A Yes, as he called from the office of the commander of the port.

Q That is when he told you that the weather had improved?

A Yes.

MR.KENNEDY:

What did he say after that?

A And, to come in at that time.

BY MR. KENNEDY:

Q When you were preparing to bring the ship in on the second approach did anyone mention to you or tell you that the stevedores were waiting to work the ship and that there was a tug standing by?

A Yes, sir, because Mr. Collie pointed out that they were around six and that they have the stevedores ready.

Q You mean that it was six o'clock?

A Yes, because the stevedores were requested for six.

Deposition Upon Oral Examination of
Vergilio Antonio Rojo Calderon

Calderon - Direct - Kennedy

5.6

DIRECT EXAMINATION

BY MR.KENNEDY:

Q Sir, for the record would you state your full name?

A Virgilio Antonio Rojo Calderon.

Q What is your occupation, sir?

A Sailor, merchant sailor.

Q By whom are you presently employed?

A By the company Baez and Ranick.

Q By whom were you employed in May of 1967?

A With Dominican Navy as a sergeant.

THE ABOVE ANSWER WAS ARRIVED AT BY MUTUAL AGREEMENT

Q Were you employed at that time at a particular port or did you work at various ports?

A I was working in the port of Santo Domingo and the port of Heina.

Q At what port were you working on May 5, 1967?

A In the port of Heina.

Q Were there any other Navy tugs employed at the port of Heina on May 5, 1967?

Were there -- excuse me?

Q Were there any other Navy tugs employed at the port of Heina on May 5, 1967?

A Mine alone.

Q When you say yours, were you employed on the tug at that time?

A No.

Q Were you employed on a tug at that time, that is on May 5, 1967?

A I was employed in the tugboat of the Marine, of the Navy.

Q What was the name of the tug?

A RP-12, HERCULES.

Q Did you on May 5, 1967 learn that a ship named the BEAUREGARD had stranded outside of the harbor?

A Yes, I went to maneuver with the ship.

Q How did you first learn of the stranding?

A We wait for the ship within the port but as the pilot of the ship gave three blasts of the whistle we went to the ship.

Q You said you were waiting for the ship in the port. What were you waiting for it for? What were you going to do with it when it arrived?

A We wait for the ship with the machines on, free, the machine idling, in free navigation, waiting for the arrival of the ship.

Q What were you going to do with your tug when the ship arrived?

A To push the ship, in order to have the ship approaching the dock, or if he have to be turned to help him to turn.

Q So, after you heard the three blasts on the ship's whistle what did you do?

A Immediately I went to the position where the

ship was.

Q How long did it take you to get to the ship?

A About four to five minutes.

Q What did you do when you arrived alongside the vessel?

A I asked the pilot what we were going to do and the pilot answer to take a line from the stern.

Q And, did you take this line from the stern?

A Yes, we take it from the -- the line from the stern of the ship.

Q After you took the line what did you do?

A I began to pull the ship and the ship began to move but then the line broke in the -- what we called before the eye of the ship.

Q Were you able to see the line as you were pulling on the line and moving the ship?

A Yes.

A Yes, I saw this because we have a glass.

A As I was pulling the ship begin to move to west.

A East. To east.

BY MR. KENNEDY:

Q And, between the time you started pulling on the line and the time the line parted did the line at any time become slack?

A No, the line was tight all the time.

Q What was the condition of the sea at the time you were pulling the line and the ship?

A We have heavy sea and wind.

A And, rain sometimes.

Q During this time was your tug going up and down in swells?

A The line was all the time tight but the tug-boat stay with the . . .

Bow.

A . . . bow, with the bow raising and going up and down.

Q Are you referring now to the bow of the tug or the bow of the vessel, the bow of the ship?

A Of the tugboat.

A It was the tugboat that was moving and the ship was moving by the . . .

A . . . by the stern.

Q Did the movement of your tug, that is in the bow and the movement of the ship from the stern, at any time cause the line to become slack?

A No, in any moment because the . . .

Not in any moment.

A Not in any moment because the line was all the time pulled by the tugboat, was at all times being pulled full by the tug.

Q How could you tell where the line had parted? You have indicated that the line parted at the point where it was coming out of the ship through this eye.

A Because I was watching at the point where the line was at the stern of the ship.

Q Did you take the line aboard after it parted?

A Yes, we put it on board.

Q Was any of the line hanging over the side of the ship?

A No, because it broke exactly on the eye.

Q Before you heard the three blasts of the whistle did you have your radio on?

A No.

Q Now, if instead of taking the line from the ship your tug did nothing but just stand by do you have an opinion as to whether the ship would have remained exactly where it was or whether it would have moved?

A Yes, the ship would move to the rocks, to the place . . .

A Anyhow, he would approach the rocks.

Q In which direction?

A To approach the place where the rocks were.

Q After the line parted did the ship move to the west?

A Yes, the ship moved to the west. He approached the old tanker.

Q Did you see the ship when it had rested in this other position?

A You mean in the last?

Q In the last position.

A Yes, the ship was approach . . .

A . . . after the wind -- after the wind pushed the ship the ship stay by the rocks, the ship lean or lie there.

"In your opinion had you not made an attempt to pull the vessel off the rocks would it have gone westerly to this position that it eventually found itself in, anyway?"

A Yes, the ship was going to that position because of the wind and the heavy seas, anyway.

Q For how long had you been in the Marina de Guerra?

A Twenty years and two months.

Q And, why did you leave?

A I request my . . .

A I request my retirement because for my -- the years that I have in the Marine, twenty years, and to receive the -- and for my age.

Q Were you working on tugboats all this time that you were in the Navy?

A An average of thirteen to fourteen years . . .

A . . . and now I am commanding a tugboat.

CROSS-EXAMINATION

BY MR. DeORCHIS:

Q Mr. Rojo, besides your tugboat were there any other tugboats assisting the BEAUREGARD on the first day?

A Yes, there was another one, the 13.

Q Was that the RP-13?

A Yes.

Q Who was the captain of the RP-13?

A Mr. Dias Gonzales, sergeant of the Navy.

Q Do you know where Mr. Gonzales is now?

A He is -- all I know is that he is in the Marine, in the Navy.

Q When is the last time that you saw Mr. Gonzales, Captain Gonzales?

A Since I was with the Navy I didn't see him again.

Q You mean since the time that the BEAUREGARD grounded you never saw him again?

A Yes, I saw him in the Navy.

Q Well, when is the last time that you saw him?

A I don't remember.

Q Have you seen him in the last four years?

A Yes, I saw him . . .

A . . . about three years or two was the last time.

A I saw him on the street in the Santo Domingo.

Q Where was the RP-13 at the time that you heard the three blasts?

A Was in Santo Domingo.

Q Is it your testimony that the RP-12 was in Heina and the RP-13 was in Santo Domingo at the time that the ship grounded?

A Yes, I was . . .

A . . . around one hour and a half arrive, the RP-13.

A From Santo Domingo to Heina the tugboat came one hour . . .

A The tugboat takes about an hour to go from Santo Domingo to Heina, plus whatever time it takes to call him.

BY MR. DeORCHIS:

Q Were you the only tugboat in Heina at the moment that the BEAUREGARD grounded?

A On duty, yes, I was alone, because the Rio Heina was in repairs.

MR. DeORCHIS:

Would you mark this as an exhibit?

MR. NELSON:

May we see it now?

MR. DeORCHIS:

Sure.

MR. KENNEDY:

Finally may we see it?

MR. DeORCHIS:

You haven't seen it?

MR. KENNEDY:

We haven't seen it. In fact, you denied you even had it.

MR. DeORCHIS:

That isn't so, Mr. Kennedy.

MR. KENNEDY:

That is true. I made a file note on that conversation. I didn't know you had this one. I knew you had one . . .

MR. DeORCHIS:

I asked you whether you had statements.

MR. KENNEDY:

I asked you whether you had statements.

MR. DeORCHIS:

And, I never told you whether I did or not.

Q When did you last see Mr. Fuste?

A In the last few days in the tugboat.

A Last Friday.

Q Had you ever seen Mr. Fuste before then?

A Only Friday. I didn't see him before.

Q When Mr. Fuste came to see you Friday did he show you a paper you had signed?

A Yes.

A Yes, the time Mr. Collie . . .

A Yes, the paper that Mr. Collie . . .

Q Was that the paper that you signed in front of Mr. Collie in 1972?

A Yes.

A Yes, in Mr. Collie's office and he was alive.

Q When Mr. Fuste showed you the paper Friday did you read the paper?

A Yes.

Q And, did you discuss it with Mr. Fuste?

A I talked to Mr. Fuste that I have done this at the time that Mr. Collie called me to make this declaration.

Q Did you tell Mr. Fuste after you had read it on Friday that it was correct?

A Yes, I told him that that was the statement that I make to Mr. Collie.

Q Would you look at this paper and tell me if that is the paper, if that is the statement that you gave Mr. Collie in 1972, a copy?

A Yes.

Q Is that your signature at the bottom of the second page?

A Yes, I signed.

Q And, on the front page is that your signature along the side?

A Yes, I signed the front page and at the bottom.

MR. DeORCHIS:

May I have plaintiff's exhibit two, and I would like to hand Mr. Kennedy and Mr. Nelson, in order to save time, an English translation and ask you if you would agree that that is a correct translation.

MR. DeORCHIS:

May we have this English translation marked for identification as plaintiff's exhibit three and have the record show that Mr. Nelson and Mr. Fuste who are fluent in Spanish have agreed that that is a fair and correct translation.

BY MR. DeORCHIS:

Q Mr. Rojo, you said that someone on the ship told you to take a line from the ship. Who was that person?

A The pilot.

Q Did the pilot give you orders in Spanish?

A Yes, the pilot talked to me because I don't speak English. He talk to me to take the line by the stern.

Q How did he communicate with you? Was it just

by voice or was it with some radio?

A The pilot talked to me with his voice as I arrived to the ship.

Q You said that you had been waiting inside the harbor for the BEAUREGARD. Is that correct?

A Yes, that is correct. We work with the ships inside the harbor.

Q Did you use that frequency 2738 at any time on that day that the BEAUREGARD ran aground?

A No, only after the ship was aground that I talked to the pilot.

Q And, was that on 2738?

A Yes.

Q Did you receive any messages from the commander of the port on that day?

A Yes, after the ship was ground I receive an order from the commander to work all the needed time with the ship.

A We came to the harbor three times to clean the filter of the machines that were overheat.

Q Do you remember a line which got into the propeller of the RP-13?

A Yes, I remember the line that was -- what is the word to use . . .

MR. DeORCHIS:

Of the propeller, yes.

A . . . of the propeller of the other . . .

A . . . tugboat.

MR. NELSON:

He said of the other tugboat.

MR. FUSTE:

Of the other tugboat, RP-13.

MR. DeORCHIS:

Of the 13.

MR. NELSON:

I want that in the answer, of the other . . .

A Yes, I remember the line that was . . .

MR. NELSON:

Twisted up in the propeller.

A . . . twisted up in the propeller of the RP-13.

MR. NELSON:

No, sir, I still want the word he used, was the other tug, the RP-13.

A Yes, on the other tug, RP-13.

BY MR. DeORCHIS:

Q That line got around the propeller of the RP-13 when the line broke? Isn't that so?

A No, no, the line that broke was mine.

Q The line that got around the propeller of the RP-13, what happened to that line?

A We took the RP-13 inside the harbor with the line on the propeller.

Q Was that a towing line, the line around the propeller, was that a towing line or was it a line from the ship? Let's put it that way.

A No, it was from the ship.

Q Did you assist the RP-13 back inside the port of Heina?

A Yes, from outside they took him inside.

Q Was the line that was around the propeller of the RP-13, was that line removed?

A Yes, after the tug was inside the harbor.

Q Was that line used to make fenders?

A I don't know what they done with.

Q You said it took four or five minutes to go out to the location of the BEAUREGARD after you heard the three blasts. Is that correct?

A Yes, because we stay from the end of the port waiting for the arrival of the ship. As they blast I went to the ship.

Q Who was on the tugboat besides you?

A The person in charge of the -- the engineer and two more sailors.

Q When you arrived alongside the BEAUREGARD in what direction was the ship in relation to the breakwater?

WHEREUPON, THERE WAS A LONG CONVERSATION IN SPANISH BETWEEN THE INTERPRETER AND THE WITNESS.

THE INTERPRETER:

He needs a sheet of paper to explain.

WHEREUPON, THERE WAS A BRIEF OFF THE RECORD DISCUSSION DURING WHICH THE WITNESS DREW A SKETCH.

BY MR. DeORCHIS:

Q Are these two things you drew here, is that the breakwaters, this one and this one?

A Yes, this is the old tanker . . .

A . . . and this is the BEAUREGARD.

Q I will put a B on the BEAUREGARD and a T on the old tanker.

A Old ship, old tanker.

Q Is that the tanker which is sunk near the breakwater?

A Yes, it is.

Q I will mark that with a T. How long did you pull on the line before it parted?

A Around ten minutes on the pulling and it was tight.

Q During the time that you were pulling did the direction of the ship remain the same?

A During the time we were pulling the ship moved to the east . . .

MR. NELSON:

In the direction I was pulling.

A . . . in the direction I was pulling, avoiding the ship to hit the breakwater.

BY MR. DeORCHIS:

Q Would you draw a line and a small tugboat to show the direction of the line and the location of the tugboat?

MR. KENNEDY:
At what time?
MR. DeORCHIS:
When he was pulling.

A That is the position.

BY MR. DeORCHIS:

Q Now, after the line parted did you have any further conversation with the pilot?

A He told me to get around and to push.

A I turn to push in.

Q On which side were you pushing?

A I was pushing from the left side, . . .

A . . . port side.

BY MR. DeORCHIS:

Q Did the pilot ask you to take another line before you went to push?

A No, he told me to get around to push in order to save time.

Q Did your tugboat refuse to take another line?

MR. KENNEDY:
At what time?
MR. DeORCHIS:
At the time right after the line broke.

A At that time I refuse to continue to push because I was -- I have in my back the air . . .

MR.NELSON:
Behind me the showers.

A . . . behind me I have the showers, so -- and then I turn -- I turn around and the pilot told me to

41
42

have another line.

THE REPORTER:

"Did your tugboat refuse to take another line?" -- Mr. Kennedy: "At what time?" -- Mr. DeOrchis: "At the time right after the line broke."

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A No, I don't refuse to take any line. I obey the orders of the pilot to turn around, to get around the ship . . .

MR. FUSTE:

And push.

A . . . and push.

MR. FUSTE:

(Spanish phrase)

BY MR. DeORCHIS:

Q Did you . . . ?

MR. NELSON:

Wait, now, wait a minute, go ahead -- you heard it, too, so I . . .

46 47 48 49

BY MR. DeORCHIS:

Q How long did you continue pushing on the port side after you went to the port side?

A I don't remember.

WHEREUPON, THERE WAS A FURTHER EXCHANGE BETWEEN THE WITNESS AND THE INTERPRETER IN SPANISH.

A I don't remember exactly but more or less forty-five minutes, three-quarters.

Q At one time you mentioned a second line. Is that correct?

A Yes.

Q Was the second line also a ship's line?

A Yes.

Q At what time were you asked to take that line?

A When I couldn't push on the inside any longer.

Q At what time did the tug RP-13 arrive alongside the BEAUREGARD?

A Around one hour and thirty minutes from Santo Domingo to Heina.

A Yes, the pilot requested me to take the line to the breakwater but I couldn't because this has to be done with a little boat.

A Yes, and it was a little boat who take the line to the breakwater. . .

A . . . because the tug couldn't take the line.
BY MR. DeORCHIS:
Q What time was it when you went into the port because your engines overheated? What time was that?
A Now I don't remember. I really should take a look at the book we have on board . . .

Q When your boat, the RP-12, assisted the RP-13 back inside the port because the RP-13 had the line around the propeller was there any tugboat pulling on the ship during that time?
A Not in this moment.

Q How long were you inside the port assisting the RP-13?
A No, I take him to the dock and I came back again to the ship.
Q When you came back to the ship had the stern of the BEAUREGARD moved to the west?
A No, it was in its place.
Q It had not moved?
A No, as he came back the ship was lying on the . . .
MR. NELSON:
Side.
A . . .shallows or the sand.

MR. NELSON:

No, he didn't say as he came back, he said when I left to take it in the ship was already aground as she stayed, and that's where it was, she had already arrived in its place and from there didn't move. Now, this is what he said.

WHEREUPON, THERE WAS AN OFF THE RECORD DISCUSSION BETWEEN THE REPORTER AND COUNSEL.

MR. NELSON:

He said when I took the tug in the ship was already against the place that it stayed and it didn't move from there.

MR. DeORCHIS:

That's not what he said. Play the Spanish back.

WHEREUPON, A TAPE RECORDING WAS REPLAYED SEVERAL TIMES, DURING AND FOLLOWING WHICH THERE WAS A GENERAL DISAGREEMENT OF COUNSEL OVER THE TRANSLATION. AFTER A LENGTHY DISCUSSION AND ARGUMENT ALL COUNSEL AGREED ON THE FOLLOWING ANSWER:

A No, it was already in its place. (The Reporter: "It had not moved?") A No, as I came back the ship was <u>abacorao</u>, in her place.

52,53,54
55

BY MR. DeORCHIS:

Q At the time that you answered the three blasts signal, at what time was that?

A Around six to six-thirty.

Q Do you recall what the wind force was at that time as you left the harbor?

A It was about fifteen knots.

BY MR. DeORCHIS:

Q What was the visibility?

A It wasn't very good, the visibility.

A Some rain squalls would pass, little rains and then winds.

Q When you took the first line from the BEAUREGARD and you were pulling on the line where were your men on the tugboat? Where were they stationed?

A They were in the front of the tug because they can't stay in the stern because if a line pulled or broke it's dangerous.

Q Were you using your stern to pull on the line?

A I received the line from the stern, with the side of the stern of the ship, and I pass it through the . . .

BY MR. DeORCHIS:

Q You passed the eye over the bitt? Is that correct?

A Yes, the eye of the line was on the bitt in order to pull.

Q And, was the bitt located on the stern of your tug?

A The bitts are located in the middle of the tug. They put the eye of the rope and they pull.

Q Did you direct the operation of putting the line over the bitt on your tug? Did you personally supervise that?

A Yes, I order . . .

A Yes, I order personally to them to put the line on the bitt and only later on the BEAUREGARD, on the ship, when they are sure the line we begin to pull.

Q Before you began to pull on the line did you look at it?

A No, I order to put the line on the bitt and then I went to the bridge where I was in the command of the ship.

Q Who was at the wheel of the tug?

A On this kind of tug it is the captain who have the wheel and that gives the order . . .

A And, the engineer is down to execute the order gave to him.

Q How long did you pull on the line before it parted?

MR. KENNEDY:

Are you referring to the first line?

MR. DeORCHIS:

57, 58
59, 60

The first line, yes.

A Around ten minutes, all the time tight.

A I said that before in the early beginning.

BY MR. DeORCHIS:

Q Were your engines at full power?

A Yes, they were on full power.

A Five hundred horsepower.

Q Was the reason that you had your crew on the bow a reason for safety?

A Yes.

A Yes, correct.

A Many times I . . .

A I say to my sailors at anytime that they have to go to the bow when I am pulling.

BY MR. DeORCHIS:

Q Is that because the line might break?

A No, this has been all the time that I command. Once we are going to pull I send my sailors to the bow. This is a security measure.

Q Is the risk that you worry about one that the line might break?

A Yes, this is the danger.

A This is a safety measure when I am pulling any type of barge or ship.

Q From the time that the BEAUREGARD ran aground to the time that she was refloated were you involved in the operation during that whole time?

A Yes.

A Yes, up to the time when another tug came from Puerto Rico and we both together pull from the bow and he was refloat again, and the tide came up and he was refloat.

Q All together how many hours did the effort take from when you first started to when you succeeded in getting her off the strand?

A Two days.

A The morning of the other day that the other tug came from Puerto Rico and the sea -- the tide came in, the ship was refloat.

Q Was the effort going on all during the night, also?

A Yes, all the time.

Q In your opinion did the pilot and the captain of the BEAUREGARD handle the salvage operation in a seamanlike manner? I will break it down for you. In your opinion . . .

Q . . . did the pilot and the captain of the BEAUREGARD . . . ?

Q . . . did they act prudently . . . ?

Q . . . in the effort to save the vessel?

A They were all the time . . .

A They were all the time fighting to save the ship and the pilot remained on board to refloat the ship from the place.

Q In your opinion did they act in a good seaman-like way? Do you know how to say seamanlike?

Yes.

A Yes, they always are trying to save the ship and refloat the ship in a professional manner.

BY MR. DeORCHIS:

Q And, the tugboats who assisted, did all of the tugboats in your opinion make a diligent effort to save the ship?

A Yes, all the time the tugs were making effort to save the ship.

Q This was a continuous effort made by the people on the boat and the people on the tugs? Is that correct?

A Yes, correct.

Q And, eventually you succeeded in saving the ship?

A Yes.

Q In your opinion if this effort had not been made what would have happened to the BEAUREGARD?

65
66

A That he never left from there and it could happen the same to the -- as the other.

Q The tanker that is sunk at the mouth of the harbor, is that what you mean by the other?

A Yes, because if they didn't make the effort to take him from this place he will -- it would remain in that place.

Q I have just one last question. In your experience have you seen new lines break as well as used lines?

A Yes, it could happen. In this new tug I have now which has thirteen hundred horsepower we were going to pull a ship called VENTURE and they sent a line of nylon, a brand new one, nylon line, and this line was pulled and I was pulling at one thousand r.p.m. only and it parted, and then we recovered the line and then the captain of the ship, of the VENTURE, passed it back on to the ship, and they gave me a heaving line and I sent the rope back.

Q How many men were in your crew on the RP-12?

A They are eight.

A But, they are only four on duty today and four on the next day.

67, 69

Q In the statement that you signed on September 28, 1972 you said that on the day of the grounding you were at Santo Domingo. Is that correct?

MR. KENNEDY:

You mean is it correct that he said it or is it correct that he was there?

MR. DeORCHIS:

I said in the statement. Read the whole question.

A No. No, he says that he was in Heina.

Q I call your attention to this passage right here in the first page of the statement.

Q Please read that second sentence beginning with "In May of 1967".

A He said that he works in the two ports, in the port of Santo Domingo and the port of Heina.

Q In the second paragraph you state that you arrived alongside the vessel about seven and a half or eight o'clock in the evening on the day she went aground. Is that correct?

A That was the day before, not the day of the grounding.

Q What was the day before?

A He said that he went to Heina the day before . . .

A . . . the coming of the ship . . .

A To move some ships of the Navy and he stayed there.

Q Were you the captain of the RP-12 or the RP-13?

A The captain of the RP-12 all the time.

MR. DeORCHIS:

Would you mark for identification the sketch that the witness drew as plaintiff's exhibit four?

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